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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term 1986

TOWN OF NORWOOD,

Petitioner,

vs.

UNCOMPAHGRE VALLEY WATER USERS ASSOCIATION, MONTROSE PARTNERS, FEDERAL ENERGY REGULATORY COMMISSION, and DEPARTMENT OF THE INTERIOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

1. Is the comprehensive hydropower licensing authority of the Federal Energy Regulatory Commission under Section 4 (e) of the Federal Power Act of June 10, 1920, 41 Stat. 1065, 16 U.S.C. 797 (e), withdrawn by the uncodified Act of June 22, 1938, 52. Stat. 941, which authorizes the Secretary of the Interior to contract for the sale of surplus power?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, the Town of Norwood, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit filed on March 5, 1986 (Petition for rehearing by Town of Norwood denied and filed by said Court of Appeals on April 7, 1986).

ORDER AND OPINION BELOW

The order of the Federal Energy Regulatory Commission[1] issued August 9, 1985, in response to the request of the Tenth Circuit Court of Appeals is reported as 32 FERC 61,218 (1985) and reprinted in the Appendix[2] hereto (App. 18a-37a). The opinion of the Tenth Circuit Court of Appeals entered March 5, 1986, reported at 785 F. 2d. 269 (10th Cir. 1986) is reprinted at App. 1a-17a. The order of the Tenth Circuit Court of Appeals denying the petition for rehearing entered April 7, 1986, is reprinted at App. 38a-39a.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on March 5, 1986. The denial of the petition for rehearing by the Town of Norwood was entered on April 7, 1986. This Court's jurisdiction is invoked under 16 U.S.C. 825 l (b) and 28 U.S.C. 1254 (1). The jurisdiction of the Tenth Circuit Court of Appeals was invoked under 16 U.S.C. 825 l (b).

STATUTES INVOLVED

Several provisions of the Federal Power Act of 1920, 16 U.S.C. 791a et seq. (as amended) (originally promulgated June 10, 1920, ch. 285, 41 Stat.

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[1]The Federal Energy Regulatory Commission (FERC) was preceded by the Federal Power Commission. FERC will be used herein unless historical context requires the use of Federal Power Commission.

[2]A number or numbers preceded by the abbreviation "App." shall be a reference to a specific page or pages in the Appendix.

1063-1077) are relevant to this petition. The provisions are:

Section 4 (e), 16 U.S.C. 797 (e)

> "To issue licenses to citizens of the United States...or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any streams or other bodies of water over which Congress has jurisdiction...or for the purpose of utilizing the surplus water or water power from any Government dam..."

Section 7 (b), 16 U.S.C. 800 (b)

> "Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development."

Section 24, 16 U.S.C. 818

> "Any lands of the United States included in any proposed project under the provisions of this Part, shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress..."

Section 29, 16 U.S.C. 823

> "All Acts or parts of Acts inconsistent with this Act are hereby repealed..."

The other statute that is relevant to this petition is the uncodified Act of June 22, 1938. It reads:

52 Stat. 941.

> "Whenever a development of power is necessary for the irrigation of lands under the Uncompahgre Valley reclamation project, Colorado, or an opportunity is afforded for the development of power under said project, the Secretary of the Interior is authorized to enter into a contract for a period not exceeding forty years for the sale or development of any surplus power. The provisions of such contract shall be such as the said Secretary may deem to be equitable: *Provided,* That no such contract shall be made without the approval of the Uncompahgre Valley Water Users' Association, which, prior to any development of power on said project, shall be required

to contract with the United States to repay the cost thereof, on such terms and conditions and with such provisions for the disposal of the annual net power profits as the said Secretary may deem equitable, and with or without interest on the construction cost as the said Secretary may determine: *And provided further,* That if the said association is not required to pay interest on the construction cost of the power plant and power systems, the net earnings of the power plant and system, after the association shall have paid the full cost thereof, and its project construction charge indebtedness to the United States shall be payable into the reclamation fund, unless Congress shall hereafter otherwise direct."

STATEMENT

The Town of Norwood is a small ranching community located in the State of Colorado and a municipality consisting of approximately 500 persons. The Uncompahgre Valley Reclamation Project (Uncompahgre Project) is northwest of Norwood. The Uncompahgre Project was completed in 1909 and was implemented under the Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. 391.

One of the principal features of the Uncompahgre Project is the 11.6 mile long South Canal which conveys water from the mouth of the Gunnison Tunnel on the east side of the Uncompahgre Valley to the Uncompahgre River in the center of the valley. Along the South Canal there are five (5) sudden changes in

elevation which are suitable for the development of hydroelectric energy. One of the drops is near the mouth of the Gunnison Tunnel; the others are interspaced along the 11.6 mile canal.

The Uncompahgre Valley Water Users' Association (Water Users) is a Colorado non-profit association which took over the operation and maintenance of the Uncompahgre Project in 1932.

The Montrose Partners is a partnership formed in the State of Massachusetts by its general partner, Mitex, Inc. Mitex, Inc. is a private hydro-developer located in the city of Boston. Montrose Partners has acted as the developer for the Water Users in attempting to develop hydro plants on the Uncompahgre Project.

On December 3, 1980, Energenics Systems, Inc., a private Washington, D.C. hydro-developer filed the first applications before the Federal Energy Regulatory Commission (FERC) to develop the hydropower potential along the South Canal. As a result of those filings before FERC, the Montrose Partners on behalf of the Water Users filed competing applications involving the City of Montrose, Colorado as an municipal applicant.[3] However, on February 2, 1984, FERC rejected the applications of the Montrose Partners in league with the Water Users and the City of Montrose and imposed a one (1) year ban upon them from filing upon the sites on the Uncompahgre Project. See 24 FERC 61,317 (1983), 26

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[3]Municipal applicants under section 7 (a) of the Federal Power Act of 1920, 41 Stat. 1067, 16 U.S.C. 800, are granted a preference in the award of licenses by FERC in the event competing applications are equally well adapted.

FERC 61,113 (1984), rehearing denied 27 FERC 61,403 (1984). FERC found that the Montrose Partners and the Water Users had obtained an unjustifiable competitive advantage over other applicants by misusing the statutory preference for municipal applicants. On June 8, 1984, the Montrose Partners for the Water Users petitioned the Tenth Circuit Court of Appeals for review of the FERC ban under 16 U.S.C. 825 l (b).

As a consequence of the FERC ban, competition was reopened for the sites along the South Canal and the Town of Norwood filed license applications for five (5) sites in April of 1985. Norwood was the only municipal entity and the only applicant from the State of Colorado to file for the sites.

During the pendency of the filings before FERC from 1980 until May 1985, the Bureau of Reclamation and the Department of the Interior (Interior) had acquiesced to licensing before FERC in all comment letters to the various applicants and on one occasion affirmatively indicated that Interior had no objection to the licensing of the projects before FERC. See page 13 and footnote 31 therein of FERC Order issued August 9, 1985, 32 FERC 61,218 (1985) reprinted at App. 36a-37a.

However, on May 6, 1985, Interior reversed its long standing position and issued a letter to FERC asserting pursuant to the uncodified Act of June 22, 1938, 52 Stat. 941, that the Secretary of the Interior, acting through the Bureau of Reclamation, had exclusive authority to develop the power potential of the Uncompahgre Project and that FERC did not have any authority to approve permits or licenses under the Federal Power Act for projects located within the Uncompahgre Project.

The letter of May 6 came to the attention of the Tenth Circuit Court of Appeals and as a result that court ordered FERC to respond. FERC so responded with its order issued August 9, 1985, *supra*. On October 17, 1985, Norwood was granted leave to intervene in the action before the Tenth Circuit Court of Appeals for the purpose of responding to the jurisdictional claim of Interior. On March 5, 1986, the Court of Appeals entered its judgment and opinion.

REASONS FOR GRANTING THE WRIT

This case presents an opportunity to reaffirm the law concerning the scope and authority of the Federal Energy Regulatory Commission (FERC) to issue licenses for small hydropower development by non-federal entities on reclamation projects owned and constructed by the federal government.

As a result of the Public Utility Regulatory Policies Act of November 9, 1978, 92 Stat. 3119, 16 U.S.C. 2601 (3), there has been a substantial increase in filing activity before FERC for hydropower development on existing small dams, including government dams. This increase has amounted to hundreds of applications.

This Court and the Fourth Circuit Court of Appeals have ruled upon hydropower projects of the Army Corps of Engineers and their effect on the scope of FERC's authority to issue licenses to non-federal entities on government dams. See *United States ex rel. Chapman v. Federal Power Comm.*, 345 U.S. 153, 97 L. Ed. 918, 73 Sup. Ct. 609 (1953) and 191 F. 2d. 796 (4th Cir. 1951). However, the opinion of the Tenth Circuit Court of Appeals ignored those rulings with respect

to the Uncompahgre Project. As such the ruling of the Tenth Circuit conflicts with the decision of this Court and the Fourth Circuit Court of Appeals.

The ruling of the Tenth Circuit Court of Appeals by failing to address the issues raised in *Chapman* or undertaking any such similar analysis, begs the question of FERC's authority. The opinion lacks analysis or policy guidance. Its ruling leaves hydropower projects for which FERC has already issued a license or preliminary permit in jurisdictional limbo.[4] [5] And as Interior claims in its *Amicus Curiae* brief before the Tenth Circuit, there are at least 28 other projects plus two major programs which could be affected by a ruling in this case.

Finally, due to the particular timing of the appearance of the jurisdiction issue before the Tenth Circuit Court of Appeals, the matter of the authority of FERC to issue hydropower licenses for the Uncompahgre Project has so far been considered by but ONE forum. Due process and equal protection afforded by Article III and the 5th and 14th Amendments to the United States Constitution appear to dictate that

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[4]For the Uncompahgre Project, as documented by footnote 4 at page 3 of the FERC order issued August 9, 1985, 32 FERC 61,218, a license was issued for Project No. 7266 on May 2, 1984 to Colorado Hydro-Power Corporation. See 27 FERC 62,104 (1984).

[5]The uncodified act of February 21, 1931, entitled, "Sale of Surplus Power Developed Under the Grand Valley Project", 46 Stat. 1202 is similar to the 1938 Act for the Uncompahgre Project. For the Grand Valley Project per a telephonic communication to FERC on or about June 10, 1985, this author was informed that a preliminary permit was issued on March 11, 1985, for Project No. 8541.

there be some effective review of that decision. If this petition for certiorari is denied, petitioner will be in the unenviable position of having had its interest as a viable license applicant before FERC terminated by one inferior court ruling without any judicial review whatsoever.

I.

The Court of Appeals incorrectly held that the 1938 act withdrew FERC's authority to issue licenses for the development of hydropower on the Uncompahgre Project.

The opinion of the Senior District Court Judge for the District of Kansas, sitting by designation for the Tenth Circuit Court of Appeals, correctly held the June 22, 1938 Act for the Uncompahgre Project to be a specific enactment authorizing the Secretary of the Interior to contract for the sale or development of surplus power. However the opinion erroneously went further (employing cursory, mechanistic reasoning without any substantive authority) and held that the authority of FERC to issue hydropower licenses on the Uncompahgre Project was withdrawn because the 1938 Act was a specific enactment controlling over the comprehensive Federal Power Act of 1920.

This opinion assumed that a specific congressional grant for the Uncompahgre Project to Interior over one aspect of hydropower development (contracting for surplus power) somehow automatically translated to a complete and exclusive grant to Interior to develop the entire hydropower potential of the Uncompahgre Project and that such interpretation was necessary in order not to eviscerate the

vitality of the 1938 Act.[6] The effect of this ruling was to choose one congressional enactment over another when in fact the two are capable of co-existence. Such selection violated the established principal that it is the duty of the courts to regard each statute as effective in the absence of a clearly expressed congressional intention to the contrary. See *Morton v.*

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[6]The Tenth Circuit in its ruling implicity assumed that authorization to contract regarding surplus power was equivalent to full authorization to exclusively develop hydropower. This mistaken reasoning is akin to determining that a grant of leasing authority to a third party for timber rights on forested land would enable that third party to convey the land in fee simple absolute.

For the foregoing conclusion, the Tenth Circuit apparently relied upon the legislative history to the section 5 of the reclamation act of April 16, 1906, 34 Stat. 117, 43 U.S.C. 522, commented upon at H.R. Rept. No. 2113, 59th Cong., 1st Sess. 2 (1906), reprinted at App. 13a-14a and again at App. 27a. That legislative declaration was made during the short lived freedom of Interior to construct reclamation projects without presidential and/or congressional approval. That changed after 1910. See Clark, *Waters and Water Rights,* volume 2, section 112.1, pages 136-137 reprinted at App. 52a-59a. See also section 4 of the Advances to Reclamation Fund act of June 25, 1910, 36 Stat. 836, 43 U.S.C. 413; section 16 of the Reclamation Extension Act of August 13, 1914, 38 Stat. 690, 43 U.S.C. 414; and section 9 (a) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1193, 43 U.S.C. 485h (a).

The statement of H.R. Rept. No. 2113 also antedated the passage of the Federal Power Act of 1920, *supra,* and its amendments. In 1935 Congress amended section 10e of the 1920 Federal Power Act (41 Stat. 1068) and specifically included reference to payment of annual charges for hydropower development on reclamation projects. See section 206, Act of August 26, 1935, 49 Stat. 842, 16 U.S.C. 803. This amendment strongly implies that Congress intended private hydropower development on reclamation projects, notwithstanding section 5 of the 1906 act.

Mancari, 417 U.S. 535, 550-551, 41 L. Ed. 2d. 290, 300-301, 94 Sup. Ct. 2474 (1974).

The Court of Appeals failed to find that the 1938 Act was simply an enactment intended to aid Interior and the Water Users to seek private capital for hydropower development; that the 1938 statute was simply intended to facilitate financing and that Congress intended to maintain FERC's authority over the Uncompahgre sites so as to preserve an alternative statutory vehicle to induce capital at a later time from another source if financing was not forthcoming under the Interior scheme.[7]

The foregoing is supported by the literal language of the 1938 Act; the relevant legislative history of the 1938 Act, another similar act, and the Federal Power Act of 1920; the contemporaneous administrative action and prior interpretations of Interior; and the current practices of Interior.

Language. The literal language of the 1938 Act provided authorization to Interior to contract for the sale or development of surplus power—nothing more.

From a first reading of the short 1938 Act, it is not immediately evident what purpose was served by the grant of contracting authority. However from the introductory statements of Congressman Taylor in sponsoring the Act, it can be seen that it was contemplated that surplus power to be developed by the project was to be used as a collateral to secure private capital (if available). See legislative history for

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[7]In fact, as envisioned by the 1938 Act, financing never was obtained.

the 1938 Act in the 83 Cong. Rec. 2248, 75th Cong. (February 21, 1938); set forth in footnote 28 to the FERC Order of August 9, 1985, *supra,* printed at App. 33a-35a and the opinion of the Tenth Circuit at App. 16a-17a.

It is not clear what particular financing scheme Congressman Taylor had in mind, but one likely scenario would be for Interior to contract for the sale of surplus power to a mine operation[8] in the vicinity of the proposed hydroplant. The contract would be on a long term basis with favorable rates provided for the mine. That contact would then be used as security for a loan from a financial institution. The loan funds would be transferred to Interior to construct the hydroplant. The loan to the federal government would be paid by revenues from power purchases by the mine, the Water Users collectively for irrigation purposes, and by the ranchers and farmers individually for their domestic uses. The payments by the Water Users could be used to repay the construction cost of the hydroplant and the other revenues could be allocated to power profits.

If one considers the capital inducement purpose of the 1938 Act, it becomes clear that the language of the two provisos in the 1938 Act simply contemplate construction by the United States IF AND WHEN private capital becomes available. The provisos in the 1938 Act do not literally provide for immediate construction of a hydroplant by the United States or authorize any federal funding theretofore. They only provide the terms of repayment by the Water Users to

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[8]This was the approximate scenario for the sale of surplus power on the Salt River hydro plant. See S. Rept. No. 826 (1922), *infra.*

the federal government should the project go forward with capital secured from a private source. See letter of Charles West, Acting Secretary of Interior, regarding the 1938 Act set out in H.R. Rept. No. 1704, 75th Cong. 3d. Sess. 2, (January 18, 1938) printed at App. 50a-51a. Such literal meaning of the 1938 Act clearly coincides with its purpose of inducing private capital.

In this light, the literal language of the 1938 Act fails to indicate a definite and final intention by Congress that the hydroplant shall actually be developed under or by Interior. Such a finding of definiteness and finality was required by this Court to find a withdrawal of the Federal Power Commission's authority in considering hydropower plants planned to be built by the Army Corps of Engineers. See *Chapman v. Federal Power Commission,* 345 U.S. 153, at 167.

The *Chapman* holding is completely applicable herein.[9] [10] [11] However, the Tenth Circuit Court of Ap-

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[9]For the Uncompahgre Project it is extremely unlikely that Congress intended definite and final federal action without using explicit mandatory language to construct. As a comparison, note just one (1) month before, Congress did make such a definite and final declaration in sections 1 and 10 of the Fork Peck Project Act of May 18, 1938, 52 Stat. 403, 406, 16 U.S.C. 833, 833i. Other examples of explicit language include sections 1 and 4 for the Hungry Horse Dam, June 5, 1944, 58 Stat. 270, 271, 43 U.S.C. 593a; sections 1 and 5 for the Weber Basin Project, August 29, 1949, 63 Stat. 677, 678; sections 1 and 2 for the Buffalo Rapids Project, October 10, 1949, 63 Stat. 725; and sections 1 and 6 for the Eklutna Project, July 31, 1950, 64 Stat. 382, 383.

[10]No feasibility numbers or report were presented to Congress for the Uncompahgre hydropower site. Thus it is unlikely that Congress would approve any federal construction. See Clark, *Waters and Water Rights, infra,* and at App. 53a-59a.

peals completely failed to address the issues of definiteness and finality of congressional intent and instead ruled simply upon the concept of specificity. This ruling of Tenth Circuit not only ignored *Chapman,* but failed to substitute any meaningful guidance to small hydrodevelopers contemplating development on reclamation projects.

Legislative History. The sparse legislative history of the 1938 Act does not support whatsoever the

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[11]In 1938 the reclamation program was in economic shambles and it is highly unlikely Congress would have approved any federal construction whatever the source of funds without a full feasibility report and careful consideration. For an interesting history and review documenting the financial descent of the reclamation program under the auspices of Interior see the following: section 14 of the Acceptance of Extension Act of July 26, 1916, 39 Stat. 390, 43 U.S.C. 475; sections 1 and 2 of Relief to Water Users act of March 31, 1922, 42 Stat. 489; Extend Relief to Water Users Act of February 28, 1923, 42 Stat. 1324-1325; sections 1 and 2 of The 1924 Relief Act of May 9, 1924, 43 Stat. 116, 43 U.S.C. 384; sections 1, 37 and 38 of The Omnibus Adjustment Act of May 25, 1926, 44 Stat. 636, 646 and amendment thereto to section 43 of the Act of 1926, dated April 23, 1930, 46 Stat. 249, 43 U.S.C. 423b; Suspension of Two Years of Annual Payments From Reclamation Fund to Treasury of February 6, 1931, 46 Stat. 1069, 1083; section 1 of the Five Million Dollar Advance to Reclamation Fund of March 3, 1931, 46 Stat. 1507, 43 U.S.C. 391a; Moratorium on Construction Charges for 1931 and 1932 act of April 1, 1932, 47 Stat. 75-78; section 1 of Moratorium on Construction Charges for 1932 and 1933 act of March 3, 1933, 47 Stat. 1427; section 1 of Moratorium on Construction Charges for 1934 act of March 27, 1934, 48 Stat. 500; section 1 of Moratorium on Construction Charges for 1935 of June 13, 1935, 49 Stat. 337; The Committee to Investigate Projects act of August 21, 1937, 50 Stat. 737; section 1 of the Relief to Water Users act of May 31, 1939, 53 Stat. 792; and the Reclamation Project Act of 1939 of August 4, 1939, 53 Stat. 1187, 1193, 1194, 43 U.S.C. 485, 485h (a), 485h (c).

claim of Interior that it has exclusive authority over the hydropower development on the Uncompahgre Project. To the contrary, the more ample legislative history of a very similar 1922 act indicates that Interior does not have such exclusive authority.

Interior claims that the specific legislation of the 1938 Act resolves the inter-agency conflict[12] between itself and FERC in its favor as to exclusive development authority over the Uncompahgre Project. Unfortunately for Interior, the 1938 Act itself, as well as its meager legislative history, are completely silent as to that claim.

However, the legislative history of a 1922 act is more ample and the issue was directly addressed, when Congress enacted a statute for the sale of surplus power for the Salt River Reclamation Project. See act of September 18, 1922, 42 Stat. 847, 43 U.S.C. 598.

In 1922, Congress, the Federal Power Commission, and Interior were parties to a proposed bill authorizing the sale of surplus hydropower on a reclamation project. The 1922 Act was to provide for the inducement of private financing for hydropower development thereon. See letter of C.C. Cragin in S. Rept. No.

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[12]See Clark, *Waters and Water Rights, infra,* section 122.3, pages 253-254 where he states: "Finally, something should be said of the great public-private struggle over power development... The source of difficulty is not a legal conflict or inconsistency between agency mandates, for the Federal Power Commission is required by statute to reject any private or local application when it concludes that a project should be undertaken by the United States itself. The difference in policy grows largely out of agency attitudes, outlook, and personnel...."

826, 67th Cong., 2d. Sess. 3-4 (April 20, 1922) at App. 43a-45a. Therein in 1922, it was agreed by Congress that in spite of granting authority to Interior to sell surplus power, the authority of FERC was to be maintained. This was to be evidenced by excluding the term "power privileges". See S. Rept. No. 826, *supra* at App. 40a-48a.

Specifically, while reviewing the proposed Salt River bill in 1922, it came to the attention of the Senate Committee on Irrigation and Reclamation that there could be a conflict between Interior and the Federal Power Commission in enacting a statute for the sale of surplus power on reclamation projects. O.C. Merrill,[13] Secretary to the Federal Power Commission, raised the matter in a letter to the committee. See letter of O.C. Merrill in S. Rept. No. 826, *supra,* pages 4-5 at App. 47a-48a. In the letter Merrill noted a potential conflict if the term "power privileges" were to included in the final enacted version of the 1922 bill.

After that input, Congress, desirous to maintain the comprehensive authority of the Federal Commission, chose to follow Merrill's advice and excluded the provision for "power privileges" from the enacted version of the Salt River act.

In supporting the 1922 bill, Congressman Hayden stated as follows:

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[13]Merrill, before coming to the Federal Power Commission appeared to have been intimately involved in the drafting of the Federal Power Act of 1920. See H.R. 715, 65th Cong., 2d. sess. 14 (June 28, 1918).

"I introduced this bill with the idea of amending section 5 of the special act that was passed in 1906, which simply authorized power leases on reclamation projects for 10 years. That act was amended in 1911 in order that leases might be made on the Rio Grande reclamation project for 50 years. I introduced this bill to place the Salt River project on a parity with the Rio Grande project. Then the question was raised that the passage of such legislation might be in conflict with the Federal water power act. At the suggestion of the Committee on Irrigation of Arid Lands, the bill was referred to the Federal Power Commission. That commission reported back that there would be a conflict if the bill contained the term "power privileges". Therefore the term "power privileges" was omitted from this bill, which deals with nothing but the sale of surplus power. If it is provided that all the terms of the Federal water power act shall apply to this bill, nothing will be accomplished. The water power act refers to power sites owned by the Government, and in consideration of their use a license fee is charged. This bill merely provides that IF in connection with the Salt River reclamation project they have surplus power to sell, then they can contract to sell it for 50 years instead of 10 years. Surplus power is all that this bill affects" [emphasis added]. See 62 Cong. Rec. 8979, 67th Cong. (June 19, 1922).

In 1938, the House Committee on Irrigation and Reclamation reviewed the proposed legislation for the Uncompahgre Project. See H.R. No. 1704, 75th Cong., 3d. Sess. (January 18, 1938) at App. 49a-51a. From its recommendation, there is not any evidence whatsoever that Congress intended to deviate from its earlier position taken in 1922 that the comprehensive authority it granted to the Federal Power Commission in 1920 be withdrawn by the specific Uncompahgre reclamation act providing the sale of surplus power. Note that in the 1938 Act, the term "power privileges" is conspicuously absent.

The intent of Congress to maintain the comprehensive authority in FERC is also reflected in the Federal Power Act, itself. Note section 29 of that act, 41 Stat. 1077, 16 U.S.C. 823, repealing all acts inconsistent with it, printed herein at page 4; section 7 (b) of that act, 41 Stat. 1067, 16 U.S.C. 800 (b) providing that the Federal Power Commission should decide if development on any given site should be undertaken by the federal government, printed herein at page 3; and section 24 of that act, 41 Stat. 1075, 16 U.S.C. 818, providing for the reservation of other disposal of lands of the United States upon the filing of an application thereon, printed at page 4.

The intent of Congress to maintain the continued authority of FERC after any passage of a specific "surplus power" act for a reclamation project is further supported by the congressional history to the Federal Power Act. In that legislative history, it is clear that Congress was very concerned about providing for continued, effective inducements to private capital so as to provide for financing of con-

struction of hydropower sites.[14] See H.R. Rept. No. 61, 66th Cong. 1st. Sess. 2-5 (June 24, 1919) and H.R. Rept. No. 404, 64th Cong., 1st Sess. 6-9 (March 21, 1916).

Thus in 1938, when Congress was presented with an alternative scheme to induce private capital to the Uncompahgre hydropower sites, it chose to support it. However, in so doing, it is equally clear that Congress had no intention whatsoever to withdraw any authority of the Federal Power Commission.[15] [16] In 1938 Congress intended that the authority of the Commission was necessary to provide for a continued, alternative mechanism for the hydropower development of the sites in the event the financing under the 1938 Act evaporated.

Contemporaneous Administrative Action and Prior

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[14]Other purposes of the Federal Power Act of 1920 included preventing economic waste, avoiding the pressure of special interest groups, and allowing a fair return on capital.

[15]Interior in its brief before the Tenth Circuit argued that the term "contract for the...development of surplus power" in the Uncompahgre Act was equivalent to "power privileges". However, Interior gave no reason or authority for Congress shifting its language away from the term "power privileges". Also in the Sale of Surplus Power Developed Under Grand Valley Project act of February 21, 1931, 46 Stat. 1202, Congress differentiated between "development of surplus power" and "power privileges".

[16]When Congress has chosen to withdraw FERC's authority for a special reason or for a large financially sound federal project, it has so stated explicitly and clearly. See Water and Power Works in National Parks of March 3, 1921, 41 Stat. 1353; Resolution of May 29, 1928, 45 Stat. 1012; and section 6 of the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1062, 43 U.S.C. 617e.

Interpretation. Virtually every action of Interior until its turnabout letter of May 6, 1985, has been consistent with the interpretation that the 1938 Act did not withdraw FERC's authority.

During the passage of the 1922 Salt River Act, the entire record is silent as to any objection of Interior to the amendment removing the words "power privileges". See S. Rept. No. 826, *supra* at App. 40a-48a, H.R. Rept. No. 1000, S.Doc. 245, and H.R. Rept. No. 1199, 67th Cong., 2d. Sess. (1922.)

During the passage of the 1938 Act, Interior made no claim for exclusive authority or the inclusion of the words "power privileges" in the Act. In fact, Interior indicated its opinion that the Uncompahgre Project was of doubtful financial or economic feasibility. See letter of Charles West in H.R. Rept. No. 1704, 75th Cong., 3d. Sess. (1938) at App. 50a-51a. Such a conclusion by Interior was tantamount to a declaration that the hydropower plants for the Uncompahgre Project were not to be constructed. See, Clark, *Waters and Water Rights,* Volume 2, sections 112.1 to 112.2, pages 136 to 141, reprinted at App. 52a-59a.

In 1953, Interior issued a policy statement favoring private hydropower development under the Federal Power Commission for any area, basin, or region under its control. It stated:

> "It is recognized that the primary responsibility for supplying power needs of an area rests with the people locally. The responsibility of the Department of the Interior is to give leadership and assistance in the conservation and wise

> utilization of natural resources. The Department does not assume that it has the exclusive right or responsibility for the construction of dams or the generation, transmission and sale of electric energy in any area, basin, or region. In general, it will not oppose the construction of facilities which local interests, either public or private, are willing and able to provide in accordance with licenses and other controls of the Federal Power Commission or other appropriate regulatory bodies and which are consonant with the best development of the natural resources of the area." See Task Force on Water Resources and Power, *Report on Water Resources and Power,* Prepared for the Commission on Organization of the Executive Branch of the Government, page 1115 (1955), reprinted in Clark, *Waters and Water Rights, supra* at section 122.3, page 254.

During the filings of the numerous competitive applications before FERC commencing in 1980, Interior continually acquiesced to and acknowledged FERC's authority in its comment letters. See FERC Order issued August 9, 1985, 32 FERC 61,218, page 13 and footnote 31 reprinted at App. 36a.

Justice Clark in his concurring opinion in *Chapman* at pages 174-175, noted that such administrative determination should be given great weight in determining whether Congress had withdrawn the authority of the Federal Power Commission. In accord see the Fourth Circuit *Chapman* decision, 191 F. 2d. 796,

802-805 (1951).

It was not until the Montrose Partners and the Water Users were before the Tenth Circuit Court of Appeals, attempting to overturn the FERC Order which effectively banned them from participation in the hydropower development on the Uncompahgre Project, that Interior raised the 1938 Act as a citation for exclusive authority. In fact, as the Tenth Circuit noted in its opinion, Interior originally advised the Water Users to file before FERC. See App. 5a.

Current Practices. While the 1938 Act envisions financing from a private source, it contemplates construction by the United States. Currently such construction action by the federal government cannot proceed simply by the enactment of the 1938 Act alone. In addition to compliance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., it appears other steps must be taken; apparently, including a reconnaissance investigation, a regional director's report, submission to Congress, and most likely further congressional authorization. See Clark, *Waters and Water Rights,* Volume 2, section 112.2, pages 138-141 reprinted at App. 52a-59a.

Thus the 1938 Act is not the final and definite action of Congress that *Chapman* requires to find a withdrawal of FERC's authority.

CONCLUSION

It is abundantly clear that the Federal Power Act of 1920 can co-exist with the 1938 Act. Also, it is clear that the 1938 Act does not indicate a final and definite intent by Congress to withdraw FERC's authority.

There are not any compelling congressional directives favoring ranchers and farmers via Interior over a local municipality via FERC as the proper party to benefit from hydropower development on reclamation projects. Not only are municipal entities favored in the Federal Power Act of 1920, but also in the reclamation statutes. Compare section 7 (a) of the Federal Power Act of 1920, 41 Stat. 1067, 16 U.S.C. 800 (a), granting a municipal preference in hydro applications, to section 5 of the reclamation Act of April 16, 1906, 34 Stat. 117, 43 U.S.C. 522 and section 9 (c) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1194, 43 U.S.C. 485h (c) wherein municipalities are to be given lease preferences.

The fate of ranchers, farmers and rural townspeople are truly intertwined. Without financially successful municipalities, there will not be adequate fire protection, schools, libraries, hospitals, and the other municipal services vital to the long-term maintenance of any rural region.

Under the comprehensive scheme of the Federal Power Act, all entities, water users and municipalities alike, are free to compete to develop the hydro potential on reclamation projects. If any water users association wishes to take advantage of a municipal preference under the Federal Power Act, it is free to enter into a realistic joint venture with a municipality in which there is full disclosure and a fair, reasonable sharing of the net power profits from the power plant.

The scheme under the Federal Power Act fosters truer competition and a freer market system for the development of hydropower on regional reclamation projects than any unilateral administration before an

agency such as Interior which is subject to favoritism and the fostering of inefficiencies.

Finally, by reaffirming the comprehensive authority granted by Congress to FERC, additional litigation before this Court may be avoided by thwarting other efforts of Interior to undermine the intent of Congress and the Federal Power Act.

For the foregoing reasons, this petition for writ of certiorari should be granted, and upon granting certiorari, this Court should reverse the determination of the United States Court of Appeals for the Tenth Circuit and reinstate the authority of FERC to issue licenses for hydropower development upon the Uncompahgre Project.

Respectfully submitted,

MARK SILVERSHER
Attorney for Petitioner

APPENDIX
DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Entered March 5, 1986

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 84-1803

UNCOMPAHGRE VALLEY WATER USERS ASSOCIATION AND MONTROSE PARTNERS,

Petitioners,

—v.—

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

DEPARTMENT OF THE INTERIOR,

Amicus Curiae.

TOWN OF NORWOOD,

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Before McKAY, MOORE, Circuit Judges, and BROWN, Senior District Judge*

*Honorable Wesley E. Brown, United States Senior District Judge for the District of Kansas, sitting by designation

BROWN, Senior District Judge.

This controversy emanates from three administrative orders issued by the Federal Energy Regulatory Commission ("FERC or Commission"), dismissing the applications for license filed by petitioners Uncompahgre Valley Water Users Association ("UVWUA") and Montrose Partners to develop six small-scale hydroelectric power projects along the South and the Montrose and Delta Canals of the Uncompahgre Valley Water System in Montrose County, Colorado, and barring the petitioners from reapplying for licenses for the same power projects for one year from February 2, 1984. The Commission's decision in dismissing the petitioners' applications and imposing the one-year ban on competition was based upon its finding that the petitioners had, through their collusive action with the City of Montrose in obtaining an unjustifiable competitive advantage over other applicants, misused the statutory preference for municipal development of hydroelectric power projects. Petitioners bring this direct appeal pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. Sec. 825l(b). They challenge the validity of these administrative orders and seek to have them set aside upon the claims that the manner in which the Commission chose to reach its final decision failed to comply with the relevant provisions of the Administrative Procedure Act and that the Commission has exceeded its adminstrative authority in ordering a punitive, instead of a remedial, sanction for a violation of the municipal preference provision.[1] This appeal, however, has taken on a new

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[1]Section 7(a) of the Federal Power Act, 41 Stat. 1067, as amended, 49 Stat. 842, 16 U.S.C. Sec. 800(a) provides: "In issu-

posture when the Court granted the Department of the Interior's request to address the question on the commission's jurisdiction over licensing for the development of hydropower facilities at the Reclamation Project in the Uncompahgre Valley. Turning to that aspect of the appeal first, we conclude that the Act of June 22, 1938, 52 Stat. 941, authorizes the Secretary of the Interior to contract with private entities for the development and sale of surplus water power when a development of such power facilities is necessary for the irrigation purposes, or an opportunity is afforded for the development of power at this reclamation project implemented under the federal reclamation and irrigation laws at the Uncompahgre Valley Water System. We hold that such authority is vested with the Department of Interior. Accordingly, we vacate the Commission's orders and dismiss the petition for review as moot.

It is important to review briefly the history of the Uncompahgre Valley Water System and the factual background that have given rise to this appeal. The

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ing preliminary permits hereunder or licenses where no preliminiary permit has been issued and in issuing licenses to new licensees under sectoin 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, the utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans."

United States became involved in a comprehensive scheme in the construction and maintenance of reclamation and irrigation projects in the arid western regions of the Nation in 1902. Pursuant to the Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. Secs. 371 *et. seq.,* the Secretary of the Interior directed the development of the Uncompahgre Valley Water System ("Water System") in the Uncompahgre Valley, Colorado. The Water System, constructed from 1903 to its completion in 1909, was the first major reclamation and irrigation project implemented under "that memorable law." *See Environmental Defense Fund, Inc. v. Higginson,* 655 F.2d 1244, 1248 (D.C. Cir. 1981, MacKinnon, J., dissenting). Its principal function is to divert the water of Gunnison River through the six-mile Gunnison Tunnel to a network of 575 miles of canals and ditches which irrigates the farms and ranches of the Uncompahgre Valley and provides water for domestic consumption in the Cities of Montrose, Olathe and Delta. *Id.*

From 1909 until 1932, the U.S. Bureau of Reclamation operated the Water System with one of the petitioners, UVWUA, a non-profit private irrigation enterprise organized by local farmers and businessmen under the Colorado laws. In 1932, the Secretary of the Interior, pursuant to Section 5 of the August 13, 1914 Act, 38 Stat. 687, 43 U.S.C. Sec. 499, transferred to UVWUA "the care, operation and maintenance" of the Water System; and since then, UVWUA has the sole responsibility for operating and maintaining the water supply project. In exchange for this authority, UVWUA has been required to repay the federal government for the costs of the original construction

and subsequent improvements of the Water System from its revenues derived from water sales.

Because UVWUA has the complete control of the Water System in regulating the flow of water, it began in mid-1979 to explore the feasibility of developing the hydroelectric power to maximize the irrigation productions in the Valley by integrating the power generating facilities along the Water System. While the Bureau of Reclamation supported a policy on preference for hydropower developments by irrigation project operators such as UVWUA, its Project Manager for the Bureau's Upper Colorado region advised UVWUA by letter of January 23, 1981 that Interior had no interest in developing the power plants having a power generating capacity of less than 5 mega-watts. The Project Manager suggested that UVWUA should file its applications on the proposed hydropower sites in the Water System with FERC as soon as possible to establish its application priority. There were two private hydropower developers who had filed permit applications in December 1980 and January 1981, respectively, for four proposed sites along the South and M & D Canals in Montrose County. UVWUA also filed a permit application in March 1981 for these sites.

Section 7(a) of the Federal Power Act, 41 Stat. 1067, as amended, 49 Stat. 842, 16 U.S.C. Sec. 800(a), *supra,* favors the developments of hydroelectric power facilities by states and municipalities. It directs that the Commission shall give preference to states and municipalities in issuing preliminary permits and licenses for hydroelectric power projects when their plans are as "equally well adapted" as those of a

private applicant. *Id.; see also* 18 C.F.R. Sec. 4.33(g)(3). To seek the competitive advantage of filing under municipal preference UVWUA obtained an agreement from the City of Montrose. Under this arrangement, the City of Montrose filed three permit applications on April 21, 1981, at the same time as UVWUA withdrew its applications that covered the same areas it had proposed to develop. In that filing, the City of Montrose agreed to name UVWUA's manager as its agent in the permit proceeding. In accordance with the statutory preference for municipal development of hydroelectric power, the Commission on October 26, 1981 issued the permits to the City of Montrose and denied the permit applications previously filed by the private applicants. Six months later, the City of Montrose filed with the Commission a request to surrender its permits. The Commission accepted the City's request on June 4, 1982. On the same day, UVWUA and Montrose Partners (a limited partnership formed under the laws of Massachusetts) filed license applications for the same sites which the City of Montrose had just given up. The Commission accepted the petitioners' license application on September 2, 1982. Approximately one year later, the Commission issued an Order on Abuse of Municipal Preference on September 21, 1983, 24 FERC §61, 317. Noting that the timing of the City of Montrose's surrender of its permits and the subsequent filing of the petitioners' license applications was apparently the result of the concerted action by these parties, the Commission believed that the petitioners had misused the municipal preference to place themselves in an advantageous competitve position over the private applicants. The Commission ordered the petitioners to respond within 30 days to a rebuttable presump-

tion that municipal preference has been abused "where a municipality obtains and surrenders a permit, and within 90 days of the effective date of the surrender, a non-municipality, in apparent coordination with the municipality, submits a license application for the same site." Upon a finding by the Commission that the petitioners failed to demonstrate that the filing of these six license applications was not the result of concerted action by the petitioners and the City of Montrose, the Commission ordered the petitioners' applications dismissed, commenced the one-year suspension and reopened bid competition for these six sites.[2]

Oral argument before this Court on issues presented by petitioners was scheduled on June 11, 1985. On May 6, 1985, the Director of Environmental Project Review from the Department of the Interior filed with FERC a letter claiming that under the Act of June 22, 1938, 52 Stat. 941, only the Secretary of the Interior, acting through the Bureau of Reclamation, has the authority to develop the power potential on the Uncompahgre Valley Reclamation Project. On this basis, Interior asserts that FERC does not have the statutory authority to approve permits and licenses for the proposed hydroelectric power projects to be located within the Reclamation Project and requests that all pending and future applications for such be rejected as being outside the jurisdiction of FERC.

The jurisdictional question was addressed to the

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[2]FERC has received 19 applications for license or preliminary permit for the power projects when it reopened the bidding process.

Court for the first time in this appeal during oral argument. Because Interior was not a party in the administrative proceedings before FERC, the Court ordered the parties to submit supplemental briefs on the jurisdictional issue. The question then becomes whether or not the Act of June 22, 1938, 52 Stat. 941, divests FERC of the general grant of authority given by Sections 4(e) and 4(f) of the Federal Power Act of 1920 (amended 1935), 16 U.S.C. Secs. 797 (e) and 797(f) over the development and sale of hydropower at the Uncompahgre Valley Reclamation Project.[3]

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[3]We note this is not the first time in which these two Government entities are jousting for jurisdiction over the development of power facilities. While there is no contention by any of the parties involved in this appeal as to Interior's standing to seek judicial review of FERC's orders in question, we believe that, in view of the Supreme Court's holding in *U.S. ex rel. Chapman v. FPC*, 345 U.S. 153, 155-156, 97 L.Ed. 918, 925 (1953), Interior has standing to assert a claim against FERC for alleged encroachment upon the statutory authority of the Secretary of the Interior. In *Chapman*, the Supreme Court concluded that the Secretary of the Interior had standing to challenge a grant of license by the Federal Power Commission to a private power company in a location assertedly reserved for development of public hydroelectric projects under the jurisdiction of Interior. The Court noted that the "specific interest" of the Secretary would be adversely affected by granting of private licensee's plan inasmuch as he had the statutory duty to market public power so as to "encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles." *Id.* at 155-156.

The Town of Norwood, Colorado, which has filed five license applications with FERC after it reopened the bidding process for the projects on February 2, 1984, is granted leave to intervene for the limited purpose of responding to the position advocated by Interior. Petitioners have moved to strike the materials attached to Town of Norwood's reply brief filed December 9, 1985. A portion of these materials concerns the

FERC concurs with Interior's view to the extent that if the Court concludes only Interior has jurisdiction to utilize the power potential at the Uncompahgre Valley Reclamation Project, such a conclusion would moot the issues assigned by petitioners in the first instant in this appeal.

FERC argues that its jurisdiction over the development of hydroelectric projects at the Uncompahgre Valley Reclamation Project lies in the general grant of authority by Sections 4(e) and 4(f) of the Federal Power Act, 16 U.S.C. Sec. 797(e) and 797(f). Section 797(e) states in pertinent part that FERC is authorized and empowered:

> To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipaslity for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over

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contracting activities undertaken by Interior in exercising its claim of jurisdiction for hydropower development on the Uncompahgre Valley Reclamation Project. The petitioners' motion to strike these materials is denied.

> which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States . . . , or for the purpose of utilizing the surplus water or water power from any Government dam....

Section 797(f) provides FERC the authority:

> To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State and municipalities likely to be interested in or affected by such application. . . .

On the other hand, Interior asserts that FERC's general licensing jurisdiction over hydropower development has been withdrawn by the Act of June 22, 1938, 52 Stat. 941, because it is a special, project-oriented enactment which provides the Secretary of the Interior the exclusive authority over the development and sale of hydropower available at the Uncompahgre Valley. Interior's argument is grounded on a statutory construction principle, restated by the Supreme Court in *Morton v. Mancari,* 417 U.S. 535,

550-551, 41 L.Ed.2d 290, 301 (1974), that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."

The 1938 Act states in pertinent part:

> That whenever a development of power is necessary for the irrigation of lands under the Uncompahgre Valley reclamation project, Colorado, or an opportunity is afforded for the development of power under said project, the Secretary of the Interior is authorized to enter into a contract for a period not exceeding forty years for the sale and development of any surplus power. The provisions of such contract shall be such as the said Secretary may deem to be equitable: *Provided,* That no such contract shall be made without the approval of the Uncompahgre Valley Water Users' Association, which, prior to any development of power on said project, shall be required to contract with the United States to repay the cost thereof, on such terms and conditions and with such provisions for the disposal of the annual net power profits as the said Secretary may deem to be equitable, and with or without interest on the constuction cost as the said Secretary may determine. . . .

While it appears that there is no judicial decision on the 1938 Act and its legislative history offers little useful guidance in resolving this jurisdictional

dispute, our task is made easier by the parties' concurrence in recognizing that the Act of 1938 is a Congressional enactment which covers a specific reclamation project established pursuant to the Reclamation Acts of 1902 and 1906. Indeed, the general language of the Act of June 22, 1938 is substantially similar to that of Section 5 of the amendatory Reclamation Act of April 16, 1906. Both of them authorize the Secretary of Interior to engage in an effort to utilize the hydropower resources as an incidental activity on reclamation. The only discernible difference between these two Acts is that the 1938 Act allows the Secretary of the Interior to enter into a contract for a period up to forty years for the sale and development of the surplus power available at the Uncompahgre Valley project, while the 1906 Act provides the Secretary with the leasing authority on "any surplus power or power privilege" of not more than 10 years in any of the reclamation projects. In view of the legislative lineage of these two Acts, we agree with the FERC that it is appropriate to construe the 1938 Act consonant with the legislative intent of the 1906 Act.

As noted earlier, the primary objective of the Reclamation Act of 1902 is the reclamation of lands in 16 designated states in the great plains and far western regions of the United States through irrigation. There was no provision in the Act for the disposition of water power produced for pumping in connection with irrigation. In 1906, Congress amended the Reclamation Act to allow the Secretary of the Interior to lease surplus water power. Section 5 of the Reclamation Act of 1906, 34 Stat. 117, states:

> That whenever a development of power

> is necessary for the irrigation of lands under any project undertaken under the said reclamation act, or an opportunity is afforded for the development of power under any such project, the Secretary of Interior is authorized to lease for a period not exceeding 10 years, giving preference to municipal purposes, any surplus power or power privilege, and the moneys derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided,* That no lease shall be made of such surplus power or power privilege as will impair the efficiency of the irrigation project.

The language of Section 5 itself does not expressly authorize the Secretary of the Interior to undertake the construction of hydroelectric facilities in an irrigation project. The legislative history of the Act, however, demonstrates that Congress intended to confer upon the Secretary such authority in those situations where "the development of power is necessary and feasible for the pumping of water for irrigation"[4] in the implementation of the reclamation

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[4]*See* H.R. Rep. No. 2113, 59th Cong., 1st Sess. 2 (1906). "In the development of irrigation projects it sometimes occurs that the development of power is necessary and feasible for the pumping of water for irrigation. In such cases the Secretary is authorized by section 5 of the act to lease surplus power not needed for irrigation purposes. It will also often occur in the construction of irrigaion works that an opportunity will be afforded by a drop in a canal, regulation of stream flow, or other-

projects. *See Burley Irrigation District v. Ickes,* 116 F.2d 529, 530-531 (D.C. Cir. 1940), *cert. denied,* 312 U.S. 687, 85 L.Ed. 1124 (1941).

The Federal Power Act was originally entitled the Federal Water Power Act of 1920, 41 Stat. 1063. The Act was a product of "a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so." *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. 152, 180, 90 L.Ed. 1143, 1158 (1945). To carry out this objective, Section 4(e) of the Act, 16 U.S.C. Sec. 797(e), empowers the FERC to issue license for "nonfederal construction and operation of water power projects on navigable waters, public lands, or reservations." *Chemehuevi Tribe of Indians v. Federal Power Commission,* 489 F2d 1207, 1240 (D.C. Cir. 1973), *rev'd on other grounds,* 420 U.S. 395, 43 L.Ed.2d 279 (1975). If comprehensive water resource management by the FERC was the central thrust of the Federal Power Act, FERC argues that its licensing authority over federally controlled water is not diluted by the Act of June 22, 1938 until the Secretary of the Interior exercises his specified authority to direct the Bureau of Reclamation either to proceed with or to contract for the development of

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wise, to develop power not needed in connection with the project, and it was deemed wise to authorize the Secretary to lease such power opportunities or privileges. No lease shall be for more than ten years, the proceeds to be placed to the credit of the project from which the power is derived, and no lease shall be made which will impair the efficiency of the project."

hydroelectric projects needed for the operation of the irrigation system at the Water System. FERC believes that the Federal Power Act allows it to retain jurisdiction over the hydropower development at the Uncompahgre Valley Reclamation Project in view of the fact that the Secretary of Interior has not taken any actions since 1938 in diligently pursuing the development of the projects in question.[5]

While FERC's argument is not without persuasive force, we find nothing in the Act of June 22, 1938 or its legislative history which would require the Secretary of Interior to implement any administrative actions in order to oust FERC's claim of concurrent jurisdiction over the development of power potential at the Uncompahgre Valley Reclamation site. It is true that Congress' intention in enacting the Federal Power Act was not only to provide for a comprehnsive management scheme of the Nation's waterways, but also to centralize the authority over such resources in the control of one Government agency. *See Iowa Hydro-Electric Cooperative v. Federal Power Commission, supra.* However encompassing the general

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[5]FERC also points out that in a series of comment letters from the Department of the Interior to FERC between 1981 and May 1985 on the applications for hydropower projects to be located in the Uncompahgre Valley Reclamation Project, the failure of Interior to question or otherwise to object FERC's jurisdiction on the development of those projects further supports the position it now urges the Court to Adopt. Interior has admitted that it erred in this aspect. We specifically reject FERC's contention that these erroneous actions taken by Interior is tantamount to a waiver of its statutory jurisdiction. This is because "even consistent error is still error." *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 678 n. 5, 98 L.Ed. 1035, 1045 n. 5 (1953).

language of the Federal Power Act may be, it is equally clear that the 1938 Act is a specially-purposed enactment which contains provisions applicable only to a specific situation. When it is read in conjunction with the Act of 1906, the 1938 Act authorizes the Secretary of the Interior to contract with private entities for the development and sale of surplus water power when a development of such power facilities is essential for irrigation purposes at the Uncompahgre Valley Water System.[6] Given the specific and cir-

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[6]The legislative history of the Act of June 22, 1938 indicates that the extent of the Government's involvement in the commercial development and sale of surplus water power created as a result of Interior's reclamation and irrigaiton project is to execute the appropriate leases or contracts with private entities to develop the hydroelectric facilities at the Uncompahgre Valley. In the comments made by Congressman Taylor of Colorado and Congressman Rich during the floor debate on this bill in the House, Mr. Taylor stated: "Mr. Speaker, the oldest reclamation project in the United States, the first one built after the reclamation law was passed in 1902, is the Uncompahgre project in my district in Colorado. This project takes water out of the Gunnison River and runs it through a 6-mile tunnel over into the Uncompahgre Valley, where it irrigates about 75,000 acres of land. At or near the mouth of the tunnel on the west side, the Pacific slope, there is a drop of several hundred feet in the canal. A private concern offers to put up the money for and built a power plant at that place on the canal. The water users on the project have agreed to pay for the power produced by that power plant. The power will be for the use of these local people...in Montrose, Delta Counties, Colorado. The Government does not put up a nickel in connection with this project and does not have any responsibility for it... This is one of the instances where the Government undertakes no liability whatever... No one outside this community will be at all responsible for this development..." Mr. Rich reiterated: "As I understand, the people who will benefit they are going to put up the money for the development for this project, and eventually the money will be

cumscribed role in which the Secretary of the Interior may exercise to dispose of surplus water power, we believe that our conclusion is supported by the principle of construction that the more specific legislation covering the given subject-matter will take precedence "over the general language of the same or another statute which might otherwise prove controlling." *Kepner v. United States,* 195 U.S. 100, 125, 49 L.Ed. 114, 123 (1904). A different conclusion in sustaining the position urged by FERC would eviscerate the vitality of the Act of 1938, rendering it a meaningless statute. We hold that FERC does not have the licensing jurisdiction to entertain an application for the development of the hydropower facilities at the Uncompahgre Valley Reclamation Project. Such function lies within the jurisdiction of the Department of the Interior, as provided by the Act of June 22, 1938, 52 Stat. 941, when a development of such power facilities is necessary for irrigation purposes, or an opportunity is afforded for the development of power at this Reclamation Project. Our decision on this jurisdictional issue renders the petitioners' appeal moot. We vacate the FERC's orders and dismiss petitioners' appeal.

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paid back to them. The Government has no obligation of any kind whatever in connection with this project." Mr. Taylor replied: "The gentleman is correct, the Government incurs no obligation in this matter." *See* 83 Cong. Rec. 2248 (Feb. 21, 1938).

FERC ORDER OF AUGUST 9, 1985

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:
Raymond J. O'Connor, Chairman;
A. G. Sousa and Charles G. Stalon.

West Slope Hydro Partners	)	Project Nos. 8022-000, 8023-000, 8024-000, 8025-000, 8026-00, 8027-000
Energenics Systems, Inc.	)	Project Nos. 8034-000, 8035-000, 8036-000, 8037-000, 8038-000 8039-000
Uncompahgre Valley Water Users Association and Montrose Partners	)	Project Nos. 8839-000, 8941-000
Town of Norwood, Colorado	)	Project Nos. 9113-000, 9114-000, 9115-000, 9116-000, 9117-000

ORDER IN RESPONSE TO COURT'S REQUEST

(Issued August 9, 1985)

This order is in response to the U.S. Court of Appeals for the Tenth Circuit's request that the Commission report to it on whether the Commission has jurisdiction to issue licenses and permits for hydroelectric projects to be located within the Uncompahgre Valley Reclamation Project (Uncompahgre project). As discussed more fully below, we find contrary to the position of the Department of Interior con-

tained in a letter filed with the Commission on May 6, 1985, that the Act of June 22, 1938, has not withdrawn our jurisdiction to issue licenses and permits for hydroelectric projects to be located at sites in the Uncompahgre project. At most, it allows the Secretary of the Interior to remove Commission jurisdiction over certain sites in the project by actually directing the Bureau of Reclamation to proceed with construction or by executing agreements with private entities permitting them to do so. However, since it does not appear that the Secretary has taken these steps with regard to any site in the project, we retain our jurisdiction over the entire project. Accordingly, we will deny Interior's request that we reject all pending and future applications for projects to be located in the Uncompahgre project.

BACKGROUND

On February 2, 1984, the Commission issued an order: dismissing applications for license filed by the Uncompahgre Valley Water Users Association (Uncompahgre) and Montrose Partners (Montrose) for six projects which would have been located within the Uncompahgre project; reopening the sites for further competition; and barring Uncompahgre, Montrose and other entities which had assisted in the preparation or filing of the six above-referenced license applications from competing in any way for these six project sites for a period of one year, effective on the date of that order.[1] Rehearing of that order was

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[1]*See* 26 FERC § 61,113 (1984). The dismissed Uncompahgre and Montrose applications for license were for Project Nos.

denied on June 7, 1984.[2] Uncompahgre and Montrose subsequently appealed those orders to the U.S. Court of Appeals for the Tenth Circuit. *Uncompahgre Valley Water Users Association and Montrose Partners v. FERC,* No. 84-1803 (10th Cir. filed June 8, 1984).

As a result of our February 2, 1984 reopening of the six site for further competition, a total of 19 applications for license or preliminary permit were filed for those sites, all of which are still pending before the Commission.[3] However, on May 6, 1985, the Department of the Interior (Interior), through its Director of Environmental Project Review, filed with the Commission a letter asserting that pursuant to a June 22, 1938 Federal statute, only the Secretary of the Interior, acting through the Bureau of Reclamation, has the authority to develop the power potential of the Uncompahgre project. Interior therefore states that the Commission does not have jurisdiction to approve permits or licenses for projects to be located

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6423, 6424, 6425, 6426, 6427 and 6428. Our dismissal of Uncompahgre's and Montrose's applications and imposition of a one-year ban on competition was based on our finding that they had abused municipal preference. *See* our earlier order in that proceeding (24 FERC § 61,317 (1983)) for a full discussion of the abuse of municipal preference issue.

[2]27 FERC § 61,403 (1984).

[3]The nineteen applications include six applications for license filed by West Slope Hydro Partners (Project Nos. 8022, 8023, 8024, 8025, 8026, and 8027), six applications for preliminary permit filed by Energenics Systems, Inc. (Project Nos. 8034, 8035, 8036, 8037, 8038, and 8039), five license applications filed by the Town of Norwood, Colorado (Project Nos. 9113, 9114, 9115, 9116, and 9117), and two identical applications

within the Uncompahgre project and requests that we reject all pending[4] and future applications for such.[5]

Because Commission concurrence with Interior's interpretation of the effect of the June 22, 1938 statute and acquiescence to its rejection request would moot the above-referenced court action, on June 11, 1985, the Tenth Circuit ordered the Commission to report to that court on or before August 10, 1985, its official position on the jurisdictional issue raised by Interior.

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for license filed by Uncompahgre and Montrose (Project Nos. 8839 and 8941). The application for Project No. 8839 was filed before the expiration of the one year ban on competition; the application for Project No. 8941 was filed after the expiration of the ban but after the close of the relevant competition period. The project proposed to be developed pursuant to these two applications would use a site different from those proposed in the other applications but competes with some of them since it would use the same water resources.

[4]In its May 6 letter, Interior listed as pending before the Commission the twelve applications collectively filed by Western Slope Hydro Partners and Energenics Systems. *See* n. 3, *supra.* In addition, it listed the application for license filed for Project No. 7266. However, that application is no longer pending before the Commission since a license was issued for the project to Colorado Hydro-Power Corporation on May 2, 1984. *See* 27 FERC § 62,104 (1984). No reference was made in Interior's letter to the Town of Norwood's and Uncompahgre's and Montrose's applications.

[5]On June 24, 1985, the Town of Norwood, Colorado, filed a response with the Commission opposing Interior's request that the Commission reject its five license applications.

DISCUSSION

Interior claims that only the Secretary of the Interior (Secretary), acting through the Bureau of Reclamation (Reclamation), has the authority to develop the power potential of the Uncompahgre project. Interior relies exclusively on the Act of June 22, 1938 (52 Stat. 941), to conclude, without explanation, that Commission jurisdiction over the Uncompahgre project has been withdrawn. The 1938 Act, in its entirety, states:

> That whenever a development of power is necessary for the irrigation of lands under the Uncompahgre Valley reclamation project, Colorado, or an opportunity is afforded for the development of power under said project, the Secretary of the Interior is authorized to enter into a contract for a period not exceeding forty years for the sale or development of any surplus power. The provisions of such contract shall be such as the said Secretary may deem to be equitable: *Provided,* that no such contract shall be made without the approval of the Uncompahgre Valley Water Users' Association, which, prior to any development of power on said project, shall be required to contract with the United States to repay the cost thereof, on such terms and conditions and with such provisions for the disposal of the annual net power profits as the said Secretary may deem to be equitable, and with or without interest on the construction

> cost as the said Secretary may determine: *And provided further,* That if the said association is not required to pay interest on the construction cost of the power plant and power system, the net earnings of the power plant and system, after the association shall have paid the full cost thereof, and its project construction charge indebtedness to the United States shall be payable into the reclamation fund, unless Congress shall hereafter otherwise direct.

While we admit that the 1938 Act is not the clearest of congressional enactments, our examination of that Act, its legislative history, and other relevant statutes, leads us to conclude that the meaning given it by Interior is neither correct nor logical.

Under Section 4(e) and 4(f) of the Federal Power Act (FPA),[6] the Commission has the authority to issue preliminary permits and licenses for hydroelectric projects to be located at Reclamation and other Federal dams and facilities. In the absence of express congressional removal of Commission jurisdiction to exercise this authority, withdrawal of the Commission's jurisdiction will be found only if "Congress takes over a project and authorizes its construction by the United States,"[7] or if Congress otherwise

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[6]16 U.S.C. §§ 797(e), 797(f).

[7]Chapman v. FPC, 191 F.2d 796, 801, (4th Cir. 1951), *aff'd,* 345 U.S. 153 (1953).

"clearly manifest(s)"[8] that the Commission's jurisdiction over the hydroelectric project is withdrawn. This is because such situations constitute repeals by implication of the Commission's authority under Sections 4(e) and 4(f) of the FPA, and repeals by implication are not favored,[9] especially where they would interfere with a comprehensive regulatory scheme established for the specific purpose of centralizing in one government agency the authority to approve non-Federal development of hydroelectric power.[10]

As discussed above, withdrawal of Commission jurisdiction can occur when Congress specifically authorizes Reclamation to construct a hydroelectric facility as part of a Reclamation project. However, it should be noted that Congress, in passing the original Reclamation Act of June 17, 1902[11] vested in the Secretary the authority to have Reclamation construction—without the need for an act of Congress—all Reclamation projects he found to be feasible.[12] Although the standards for what constitutes a feasible project, and what procedures must be complied with, have varied over the years,[13] it appears

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[8]Chapman v. FPC, 345 U.S. at 170.

[9]*See* Morton v. Mancari, 417 U.S. 535 (1974).

[10]*See* East Columbia Basin Irrigation District, 21 FERC § 61,091 (1982) at 61,283.

[11]32 Stat. 388.

[12]*See* Sections 2 and 4 of that Act, 32 Stat. 388, 389.

[13]*See* the forward to Bureau of Reclamation, United States Department of the Interior, *Bureau of Reclamation Project*

that the Secretary retains the authority to administratively authorize projects,[14] even though it does not appear that this authority has been used since 1963.[15]

The authority to administratively approve projects provided to the Secretary by the 1902 Act was limited to the approval of "irrigation works";[16] no mention was made of hydroelectric facilities. However, by Section 5 of the Act of April 16, 1906,[17] Congress corrected this "oversight"[18] by expanding the Secretary's authority to include such facilities. Specifically, that section provides:

> That whenever a development of

Feasibilities and Authorization (1957), for a discussion of the evolution of the automatic authorization process. *See also* n. 20, *infra*, for what appear to be the most current statutory provisions pertaining to the automatic authorization process.

[14] *But see* the Federal Water Project Recreation Act of 1965 (79 Stat. 213), which requires congressional authorization of Reclamation feasibility-level studies. It is not clear if this statute would prohibit a Secretary from making a finding of feasibility under the administrative authorization process.

[15] *See* pp. 18-19 of the 1968 supplement to the source cited in n. 13, *supra*.

[16] *See* Section 2 of the Act of June 17, 1902, 32 Stat. 388.

[17] 34 Stat. 116, 117.

[18] *See* pp. 69-70 of Golze, *Reclamation In The United States* (1961), quoted in n. 3 of Uhlmann v. Wren, 401 P.2d 113, 119 (S. Ct. of Ariz. 1965):

> The entrance of the Federal Government into power production in the Western States was

> power is necessary for the irrigation of lands under any project undertaken under the said reclamation act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding 10 years, giving preference to municipal purposes, any surplus power or power privilege, and the moneys derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided,* That no lease shall be made of such surplus power of power privilege as will impair the efficiency of the irrigation project.

Although that section does not specifically state that the Secretary can direct Reclamation to construct hydroelectric facilities, the fact that it provides

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> purely incidental. While the possibilities of the Western streams for hydroelectrical generation was [sic] early recognized, the original Reclamation Act of 1902 made no specific provision for such generation or for sale of power... .
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> * * *
>
> Congress amended the oversight of the original Reclamation Act by the Act of Apr. 16, 1906, which authorized the government to lease surplus power, giving preference to municipal purposes. Revenues from the sale of power were credited against the construction of the power plant and the reclamation project on which it was located.

him with the authority to lease surplus power clearly implies that he has the authority to do so. However, the legislative history of that Act seems to indicate that the Secretary's authority to authorize the construction of hydroelectric facilities was intended to be limited to those situations where the development of power is necessary for the pumping of water for irrigation purposes, and that the construction of such facilities was to be left to other entities through the lease of power privileges whenever the power to be produced by the facilities is not needed in connection with the irrigation project.[19]

It is not clear if the Secretary must always utilize the administrative authorization process and make findings of feasibility before developing hydroelectric facilities and leasing their surplus power or leas-

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[19]*See* H.R. Rep. No. 2113, 59th Cong., 1st Sess. 2 (1906):

> In the development of irrigation projects it sometimes occurs that the development of power is necessary and feasible for the pumping of water for irrigation. In such cases the Secretary is authorized by section 5 of the act to lease surplus power not needed for irrigation purposes. *It will also often occur in the construction of irrigation works that an opportunity will be afforded by a drop in a canal, regulation of stream flow, or otherwise, to develop power not needed in connection with the project, and it was deemed wise to authorize the Secretary to lease such power opportunities or privileges.* No lease shall be for more than ten years, the proceeds to be placed to the credit of the project from which the power is derived, and no lease shall be made which will impair the efficiency of the project. [Emphasis added.]

ing power privileges to others pursuant to the authority granted by the 1906 Act. It appears that if the Secretary is contemplating doing either when he is formulating a proposal for initial administrative authorization, he would include in his feasibility analysis and authorization process his plans for so doing since the revenue to be generated thereby could significantly impact the feasibility of the proposal. Also, although the 1906 Act on its face seems to indicate that the Secretary can direct Reclamation to construct hydroelectric facilities or lease power privileges with regard to existing Reclamation projects without resorting to the administrative authorization process, other provisions of Reclamation law indicate that the construction of hydroelectric facilities on existing reclamation projects must be preceded by a formal administrative authorization and feasibility finding, at least where Reclamation is to construct the facilities at the direction of the Secretary.[20]

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[20]Section 9(a) of the Reclamation Project Act of 1939 (Act of August 4, 1939), 43 U.S.C. § 485h(a), which appears to contain the most current provisions regarding the administrative authorization process, provides:

> No expenditures for the construction of any new project, new division of a project, *or new supplemental works on a project* shall be made, nor shall estimates be submitted therefor, by the Secretary until he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on—
>
> (1) the engineering feasibility of the proposed construction;
>
> (2) the estimated cost of the proposed construction;
>
> (3) the part of the estimated cost which can

It is clear from the foregoing that a derivation of the withdrawal of Commission jurisdiction through congressional authorization of Reclamation construction of hydroelectric facilities at a Reclamation project exists: use of the authority granted to the Secretary by Section 5 of the 1906 Act to have Reclamation construct hydroelectric facilities and lease surplus power or to lease power privileges to others to con-

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properly be allocated to irrigation and probably be repaid by the water users;

(4) the part of the estimated cost which can properly be allocated to *power* and probably be returned to the United States in net power revenues;

(5) the part of the estimated cost which can properly be allocated to municipal water supply or other miscellaneous purposes and probably be returned to the United States.

If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, *power,* and municipal water supply or other miscellaneous purposes found by the Secretary to be proper, together with any allocation to flood control or navigation made under subsection (b) of this section, equal the total estimated cost of construction as determined by the Secretary, then the new project, new division of a project, *or supplemental works on a project,* covered by his findings, shall be deemed authorized and may be undertaken by the Secretary. If all such allocations do not equal said total estimated cost, then said new project, new division, or new supplemental works may be undertaken by the Secretary only after provision therefor has been made by Act of Congress enacted after the Secretary has submitted to the President and the Congress the report and findings involved. [Emphasis added.]

struct such facilities. It is equally clear, however, that the mere existence of the aforementioned Section 5 has not resulted in the withdrawal of Commission jurisdiction over all Reclamation projects. The contrary conclusion—that Commission jurisdiction over all Reclamation projects has been withdrawn by Section 5 and other provisions of Reclamation law enacted after the FPA—[21] requires us to assume either that in enacting Sections 4(e) and 4(f) of the FPA giving the Commission the authority to issue licenses and permits for hydroelectric projects located at Federal dams Congress was enacting a partially meaningless provision, or that it intended to partially repeal by implication the Commission's authority in this regard. Since the first assumption

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It is clear from the references to "power" and "new supplemental works" in Section 9(a) and from Section 9(c) of that Act, 43 U.S.C. § 845h(c) (sic), that the Congress intended for the construction of hydroelectric facilities by Reclamation at the direction of the Secretary at existing Reclamation projects to fall within the scope of Section 9(a). Section 9(c) provides, in part, that:

> Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 percentum per annum, and such other fixed charges as the Secretary deems proper.

[21] *See* that portion of Section 9(c) of the Reclamation Project Act of 1939 set out in n. 20, *supra,* which impliedly gives the

runs partially afoul of the rule of statutory construction that requires a statute to be construed so that no part will be void or insignificant,[22] and since the second assumption is inconsistent with the rule disfavoring repeals by implication,[23] we decline to embrace either.

Consistent with the rule of statutory construction which requires statutes on the same subject to be construed in harmony if reasonably possible,[24] we believe the correct interpretation of the interrelationship of these statutes is that, although the Secretary retains authority to act pursuant to Section 5 of the 1906 Act, the Commission's jurisdiction to issue licenses and permits for hydroelectric projects located at Reclamation projects is not withdrawn until the Secretary takes some affirmative step to exercise his authority. With regard to hydroelectric facilities which will be constructed by Reclamation at the direction of the Secretary, it appears that the Secretary would have to have the construction approved pursuant to the administrative authorization process and actively direct Reclamation to proceed with construction before the Commission's jurisdiction would be withdrawn. As to the construction of hydroelectric facilities by other entities pursuant to

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Secretary the same general authority provided by Section 5 of the Act of April 16, 1906.

[22] *See* 2A Sutherland Statutory Construction § 46.06 (C.Sands 4th Ed. 1984 Revision).

[23] *See* Morton v. Mancari, n. 9, *supra*.

[24] *See* 2A Sutherland Statutory Construction § 51.02 (C. Sands 4th Ed. 1984 Revision).

the lease of power privileges, the necessary affirmative step would be the Secretary's execution of appropriate lease agreements. This interpretation, by preserving the respective authorities of the Commission and the Secretary, is reasonable, logical, and most appropriately effectuates Congress' intent in enacting these statutes.[25]

The Act of June 22, 1938, which Interior asserts has removed our jurisdiction to issue permits and licenses for projects to be located in the Uncompahgre project, is essentially the same as Section 5 of the 1906 Act.[26] As such, it should be construed in the same manner as that previous act. Since we are not aware that the Secretary has taken any of the necessary affirmative steps discussed previously with regard to the Uncompahgre project or any part

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[25]This interpretation is also consistent with our East Columbia Basin decision, n. 10, *supra*, where we held that the Act of April 16, 1906 and Secion 9(c) of the Reclamation Project Act of 1939 (*see* n. 20, *supra*), and Section 10(c) of the FPA (relating to the imposition of annual charges), represent separate and distinct legislative schemes and that our and the Secretary's respective authorities thereunder were not limited by the other statute or statutes.

[26]Instead of providing that the Secretary can lease "any surplus power or power privilege" as in the case of Section 5 of the 1906 Act, the 1938 Act provides that the Secretary can enter into a contract for the "sale or development of any surplus power." Although the exact wording of these two statutes are different, we believe that the authority granted to the Secretary by them is the same—the authority to direct Reclamation to construct hydroelectric facilities and lease surplus power or lease or contract with others to develop the hydroelectric facilities.

thereof, we believe that our jurisdiction over projects in the Uncompahgre project has not been withdrawn by the 1938 Act and that we may act on applications for such until those affirmative steps have been taken.[27] [28]

The fact that Congress passed a special statute for the Uncompahgre project in 1938 instead of relying on the provisions of the 1906 Act does not compel us to reach a contrary conclusion. We believe Congress enacted the latter statute simply to provide for a

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[27]The completion of the necessary affirmative steps by the Secretary with regard to a particular site within the Uncompahgre project would only withdraw our jurisdiction to issue licenses and permits for projects at that site; we would retain our jurisdiction to act on applications for projects to be located at other sites within the project. *See* our discussion of the analogous situation presented when Congress only authorizes Reclamation to develop a portion of the hydroelectric potential of a Federal dam in City of Gillette, Wyoming, 25 FERC §61,366, n. 2 at 61,817 (1983).

[28]Although, as indicated in n. 26, *supra,* the language of the 1938 Act appears to give the Secretary the authority to have either Reclamation or some other entity develop hydroelectric facilities at the Uncompahgre project, the legislative history of that Act indicates that Congress was contemplating *private*—and not Secretarial—development of the project. *See* the explanation of the bill which became the 1938 Act made by Congressman Taylor of Colorado during House floor debate and his subsequent coloquy with Congressman Rich:

Mr. Taylor of Colorado. Mr. Speaker, the oldest reclamation project in the United States, the first one built after the reclamation law was passed in 1902, is the Uncompahgre project in my district in Colorado. This project takes water out of the Gunnison River and runs it through a 6-mile tunnel over into the Uncompahgre Valley, where it irrigates about 75,000 acres of land. At or near the mouth of the tunnel on the west side, the Pacific

longer contract period for any hydroelectric facility to be constructed at the project (the 1906 Act provides for up to a ten-year contract; the 1938 Act provides for up to a forty-year contract) and to establish specified repayment provisions for any such development. Our conclusion in this regard is buttressed by the fact that on at least two occasions between 1906 and 1938 Congress passed legislation similar to the 1938 Act to provide longer contract terms for two other

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slope, there is a drop of several hundred feet in the canal. A private concern offers to put up the money for and build a power plant at that place on the canal. The water users on the project have agreed to pay for the power produced by that power plant. The power will be for the use of these local people. This development is purely for the use of the residents of the Uncompahgre Valley project in Montrose and Delta Counties, Colorado.

The Government does not put up a nickel in connection with this project and does not have any responsibility for it. After the whole plant is paid for and the power people have been paid off, the further proceeds of the sale of power would go into the reclamation fund, subject to congressional action hereafter. This is one instance where the Government undertakes no liability whatever. It would be a benefit to the housewives, the farmers, and everybody on that project to have this plant produce the power for their own local consumption. It would help run the farms, machinery, and especially, I hope, the washing machines of the housewives. The production of this power would be of general benefit. No one outside this community will be at all responsible for this development. It is certainly a meritorious matter. It is purely a local concern. I hope the House will allow these people to make that arrangement with the power company, which they have agreed to do, and build this local plant on the line of that canal.

Mr. Rich. As I understand, the people who will benefit there are going to put up the money for the development of this project, and eventually the money will be paid back to them. The Government has no obligation of any kind whatever in connec-

Reclamation projects,[29] and by our knowledge that a determination by us that the 1938 Act has removed our jurisdiction with regard to the Uncompahgre project could require that a similar determination be made with regard to the 1906 Act and our jurisdiction over all Reclamation projects, a determination which, as discussed previously, is unsupportable.

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tion with this project?

Mr. Taylor of Colorado. The gentleman is correct. The Government incurs no obligation in the matter.

83 Cong. Rec. 2248 (Feb. 21, 1938). Although we are not deciding this point at this time, an argument can be made in light of this legislive history that the 1938 Act only gives the Secretary the authority to allow private development of hydroelectric facilities, and only then if the private development occurs at or near the mouth of the west end of the Gunnison Tunnel. Under this interpretation of the 1938 Act, the Secretary would not have any authority to order Reclamation to develop the power potential of the Uncompahgre project, regardless of what affirmative steps he may take. Also, if the intent expressed in the legislative history of the 1906 Act is found to be applicable by analogy to the 1938 Act (*see* n. 19, *supra*, and the text of this order to which it pertains), and if it is found that the development of hydroelectric power is not necessary for the pumping of water for irrigation purposes at the project, another argument would exist for holding that the Secretary is not authorized to permit Reclamation development of the hydroelectric power potential of the project. Finally, if the Federal Water Project Recreation Act of 1965 is found to have ended the Secretary's ability to administratively authorize Reclamation construction of hydroelectric facilities (*see* n. 14, *supra*), the Secretary could not direct Reclamation to proceed with the construction of any hydroelectric facilities at the Uncompahgre project.

[29]*See* the Act of February 24, 1911, 36 Stat. 930, amending Section 5 of the Rio Grande project. Section 5 as amended by

In concluding that the Commission's jurisdiction to issue licenses and permits for projects to be located in the Uncompahgre project has not been withdrawn by the Act of June 22, 1938, we, as Justice Clark did in a similar situation in his concurring opinion in *Chapman v. FPC,* [30] note and give weight to the fact that Interior, which theoretically is intimately familiar with its governing statutes, failed to raise this jurisdictional issue in any of the numerous comment letters on applications for projects to be located in the Uncompahgre project it filed with the Commission in a four-year period prior to May 6, 1985.[31] Indeed, in an October, 1982 letter authored by the author of the May 6, 1985 letter instituting this jurisdictional dispute, Interior stated that "[w]e do not object to the licensing of these projects..." and that "[i]f a non-Federal power plant is developed at these sites, a charge for lease of power privileges will be assessed to compensate the Federal government for the use of its facilities."[32] These statements by Interior assume the Commission's jurisdiction to

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the 1911 Act is now codified at 43 U.S.C. § 522. *See also* the Act of September 18, 1922, 42 Stat. 847, which provides for up to a fifty-year contract for the Salt River project. This Act is now codified at 43 U.S.C. § 598.

[30]345 U.S. 153, 174-75 (Clark, J., concurring).

[31]*See, e.g.,* letter of comment filed July 27, 1981 for Project No. 4570; letter of comment filed August 6, 1981, for Project No. 4571; letter of comment filed November 15, 1982, for Project No. 6428; letter of comment filed September 23, 1983, for Project No. 7266; and letter of comment filed on September 10, 1984, for Project Nos. 8034, 8035, 8036, 8037, 8038, and 8039.

[32]This letter of comment was filed with the Commission on

license non-Federal development of hydroelectric power at the Uncompahgre project and, together with Interior's failure to raise the jurisdictional issue in its other comment letters, undercut Interior's recent change of position and lend credence to our finding of jurisdiction.

The Commission finds and orders:

(A) The Commission has jurisdiction to issue licenses and permits for non-Federal development of hydroelectric power at sites in the Uncompahgre Valley Reclamation Project.

(B) The Department of the Interior's request that the Commission reject all pending and future applications for projects to be located at sites in the Uncompahgre Valley Reclamation Project, filed with the Commission on May 6, 1985, is denied.

(C) The Secretary of the Commission shall file a copy of this order with the U.S. Court of Appeals for the Tenth Circuit on or before August 10, 1985.

By the Commission.

(S E A L)

Kenneth F. Plumb

Kenneth F. Plumb,
Secretary.

October 26, 1982, and pertained to Project Nos. 6432, 6424, 6425, 6426 and 6427.

RULING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING

ENTERED—APRIL 7, 1986

Before the Honorable Monroe G. McKay, Honorable John P. Moore, Circuit Judges and Honorable Wesley E. Brown, District Judge.

No. 84-1803

UNCOMPAHGRE VALLEY WATER USERS ASSOCIATION AND MONTROSE PARTNERS,

Petitioners,

—v.—

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

DEPARTMENT OF THE INTERIOR,

Amicus Curiae.

TOWN OF NORWOOD,

Intervenor.

The Court has for consideration in the captioned case: (1) Respondent's motion for extension of time to April 18, 1986, to file petition for rehearing; (2) Petitioner's response in opposition to respondent's motion for extension of time; and (3) Intervenor's motion for extension of time to April 8, 1986, to file petition for rehearing. (Intervenor's petition for rehearing was filed March 19, 1986.)

Upon consideration whereof respondent and intervenor's motions for extension of time to file peti-

tions for rehearing are denied.

Further, intervenor's petition for rehearing filed March 19, 1986, is denied.

ROBERT L. HOECKER
Clerk

PORTION OF SENATE REPORT NO. 826 (1922)

67TH CONGRESS, 2d Session. } SENATE { REPORT NO. 826.

SALT RIVER RECLAMATION PROJECT, ARIZONA

APRIL 20 (calendar day, JULY 15), 1922.—Ordered to be printed.

MR. CAMERON, from the Committee on Irrigation and Reclamation, submitted the following

REPORT

[To accompany H.R. 10248.]

The Committee on Irrigation and Reclamation, to whom was referred the bill (H.R. 10248) authorizing the sale of surplus power developed under the Salt River reclamation project, Arizona, having considered the same, report favorably thereon with the recommendation that the bill do pass with amendments.

Amend the title to read "Authorizing the lease of surplus power developed under the Salt River reclamation project, Arizona."

On page 1, line 9, strike out the word "sale" and insert in lieu thereof the world "leases."

On page 1, line 10, strike out the world "sales" and insert in lieu thereof the word "leases."

On page 1, line 15, strike out the world "sale" and insert in lieu thereof the world "lease."

On page 2, line 7, strike out the word "sale" and insert in lieu thereof the world "lease."

Senate Report No. 826 (1922)

The purpose of this bill is to enable the Secretary of the Interior to approve contracts for the sale of power developed in connection with the Salt River reclamation project for terms not exceeding 50 years. Under existing law power leases can not be made for more than 10 years, except under the Rio Grande project in Texas and New Mexico, where 50-year leases were authorized by the act approved February 24, 1911.

H.R. 10248 is in effect the same as S. 3605, introduced in the Senate by Senator Ashurst, and referred to the Senate Committee on Irrigation and Reclamation. The bill was referred to the Secretary of the Interior and the committee was advised through the following report from the Acting Secretary of the Interior that its enactment was agreeable to the department:

DEPARTMENT OF THE INTERIOR,
Washington, June 17, 1922.

HON. CHARLES L. MCNARY,
Chairman Committee on Irrigation,
United States Senate.

MY DEAR SENATOR: Answering your request for report on S. 3605, a bill "Authorizing the sale of surplus power developed under the Salt River irrigation project, Arizona," I have to advise you that the measure as presented would be applicable to the Salt River irrigation project alone and would extend the right to dispose of surplus power upon this project from the present period of 10 years to not exceeding 50 years.

The department has no objection to the enactment of the measure, but would suggest that line 3, page 2, be amended by striking therefrom the world "lease" and substituting therefor the word "contract" and that after the word "made" in the same line there be inserted the words "for the sale," so that the clause shall read "that no contract shall be made for the sale of such surplus power as will impair the efficiency of said project." The latter suggestion is made for the sake of uniformity, confor-

ming with the language in the other portions of the bill.

Respectfully,

E. C. FINNEY, *Acting Secretary.*

A comprehensive report to accompany H.R. 10248 was submitted by Mr. Hayden, of the Committee on Irrigation or Arid Lands of the House of Representatives, which is attached hereto.

It is the opinion of the committee that the enactment of this bill, with the suggested amendments, will, under safeguards, permit the development of additional hydroelectric power in connection with the Salt River project. The title to all such improvements remains in the United States and this development will substantially increase the security for the sums due to the United States for the construction of the projects without appropriations by Congress.

[House Report No. 1000,
Sixty-seventh Congress, second session.]

The Committee on Irrigation of Arid Lands, to whom was referred the bill (H.R. 10248) to amend the act of April 16, 1906, and the act of February 24, 1911, relative to the lease of surplus electric power on Federal irrigation projects, having considered the same, report the bill back to the House with an amendment and as so amended recommended that the bill do pass.

Strike out all after the enacting clause and insert in lieu thereof the following:

"That whenever a development of power is necessary for the irrigation of lands under the Salt River reclamation project, Arizona, or an opportunity is afforded for the development of power under said project, the Secretary of the Interior is authorized, giving preference to municipal purposes, to enter into contracts for a period not exceeding fifty years for the sale of any surplus power so developed, and the money derived from such sales shall be placed to the credit of said project for disposal as provided in the contract between the United States of America and the Salt River Valley Water Users' Association, approved September 6, 1917: *Provided,* That no lease shall be

made of such surplus power as will impair the efficiency of said project: *Provided, however,* That no such contract shall be made without the approval of the legally organized water users' association or irrigation district which has contracted with the United States to repay the cost of said project: *Provided further,* That the charge for power may be readjusted at the end of five, ten, or twenty year periods after the beginning of any contract for the sale of power in a manner to be described in the contract."

Amend the title to read: "A bill authorizing the sale of surplus power developed under the Salt River reclamation project, Arizona."

The purpose of this bill is to enable the Secretary to approve contracts of the sale of power developed in connection with the Salt River reclamation project for terms not exceeding 50 years. Under existing law power leases can not be made for more than 10 years except under the Rio Grande project in Texas and New Mexico, where 50-year leases were authorized by the act approved February 24, 1911. The necessity for this legislation is clearly set forth in the following letter from the general superintendent of the Salt River project.

SALT RIVER VALLEY WATER USERS' ASSOCIATION,
Phoenix, Ariz., March 24, 1922.

HON. CARL HAYDEN,
House of Representatives, Washington, D.C.

MY DEAR MR. HAYDEN: Relative to your wire to Mr. Reid, received to-day, the power system of the Salt River project was originally started by the United States Reclamation Service for construction purposes in connection with Roosevelt Dam. Approximately one-half of the present system was construrcted with reclamation funds. The balance has been paid for by direct assessments on the farmers of this valley and by some of our customers, who have received their money back by a rebate of their monthly power bills. Details are as follows:

Amount invested by Water Users' Association at this date	$1,714,767.96
Amount paid for by consumers and repaid in power	430,002.78
Total	2,144,770.74
Amount invested at this date by United States Government	2,543,852.38

Total cost of the system 4,688,623.12

Prior to the expenditure of various sums of money by the Water Users' Association and consumers the power system produced but little more than operating expenses. This will be seen from an examination of the Reclamation Service reports prior to 1915. From 1910 to 1915 the Water Users' Association paid the United States Reclamation Service $1,142,000 for the partial completion of this power system. The earnings of the power system increased from that date up to a gross of $355,264 in the year 1918 to 1919. Further investment on the part of the water users and their customers has increased this gross revenue to over $500,000 in every year since 1919. The plant is now paying about 5 per cent interest on the investment, with the delivery last year of 61,000,000 kilowatt hours. The completion of the system would permit the delivery of three times this amount of power with a relatively small increase of operating expenses and no additional length to our transmission system. To deliver this additional power the voltage will have to be raised upon our present transmission system, but this is a relatively simple matter. In other words, by the increase of our generating capacity and simple adjustments in our transmission system, the plant can be made a very beneficial one to this project, insuring uninterrupted payments to the Government.

The proposed additional development is set forth in a report, a copy of which has been furnished the Reclamation Service. From discussions with Mr. Davis, and our general knowledge of the financial situation in Washington, we have felt that it would be impossible to look for any Government aid in this development.

Under our contract with the Government any new development or extension of our present power system automatically becomes the property of the United States Government; to be operated for the benefit of the project it is true, but nevertheless the title will always remain in the United States Government. Furthermore, the Government now has a prior lien on this project of over $9,000,000. This makes the financing of this new development a difficult proposition by any of the usual methods. Direct assessment on the farmers of this valley for this development would be useless to consider at this time.

We therefore ask that a 50-year contract be made legal in order that we can finance this additional development by the

same method as our Roosevelt-Miami transmission line was financed by the Inspiration Copper Co.; our Chandler Power Plant by the Magma Copper Co.; our Marinette Development, etc. This method was the advancing of the money by the prospective customers, the same to be repaid in power. These various developments financed by this method in the past were relatively small items, the largest being $204,000 advanced by the Inspiration Copper Co. for the transmission line. The existing 10-year law was sufficient for those purposes. We now propose to finance an entire power house and change of our transmission system to an amount equivalent to approximately $175 per kilowatt desired by the consumers. To retire this amount with interest and still leave a margin to cover depreciation and operating expenses and a reasonable addition to our income will require a long-time contract, such as is outlined in your bill, No. 10248.

There is also a decided advantage in the long-time contract from the standpoint of the United States Government and this association, in that our future market will be protected and the large existing investment in our power system maintained without deterioration.

Any further information in general or in detail that you may desire please feel free to wire us at our expense, in order that this important legislation may not be delayed. We have reached a point with our plans which indicate that the Inspiration Copper Co. and Miami Copper Co. have decided to finance this development, provided this legislation is enacted and our hydraulic studies are confirmed.

I wish to thank you for myself, and for the Water Users' Association, for your efforts to date in this and other very beneficial legislation.

Very truly yours,

C. C. CRAGIN
General Superintendent and Chief Engineer.

The bill was referred to the Secretary of the Interior, and your committee was advised that the purpose of the bill is commendable and its enactment agreeable to the department. The report of the Acting Secretary is as follows:

DEPARTMENT OF THE INTERIOR,
Washington, February 15, 1922

Senate Report No. 826 (1922)

Hon. M.P. KINKAID,

Chairman Committee on Irrigation of Arid Lands,

House of Representatives.

MY DEAR MR. WHITE: Reference is made to your letter of February 6, 1922, inclosing copy of H.R. 10248 with request for report.

The proposed measure is entitled "A bill to amend the act of April 16, 1906, and the act of February 24, 1911, relative to the lease of surplus electric power on Federal irrigation projects."

It is noted that the proposed amendment consists of the addition to existing law of the words "and the Salt River project in Arizona," in line 9, on page 2, of the printed bill. The power leasing act of April 16, 1906, permitted leases of surplus electric power on Federal irrigation projects for not exceeding 10 years. The act of February 24, 1911, made an exception in the case of the Rio Grande project in Texas and New Mexico by permitting such leases under that project for not exceeding 50 years. H.R. 10248 would extend that exception to include the Salt River project in Arizona.

The purpose of the bill is commendable, and its enactment is agreeable to this department, but it is believed that the 50-year leasing right should be extended to all. Federal irrigation projects. Under section 6 of the Federal water power act of June 10, 1920 (41 Stat. 1063), the Congress established a 50-year limitation covering power rights, and it would seem appropriate to make this same limitation apply to all of our projects. The Reclamation Service is now selling surplus electric power on the Salt River, Rio Grande, Boise, Minidoka, North Platte, Newlands, North Dakota Pumping, and Strawberry Valley projects.

If this suggestion is approved, H.R. 10248 may be amended by changing the word "ten" in line 12, page 1 of the bill, to the word "fifty," and by deleting the last proviso of the bill, commencing in line 6, page 2, after the word "project."

Respectfully,

E.C FINNEY, *Acting Secretary.*

A question arose as to whether the terms of the bill as introduced were in conflict with the Federal water power act approved June 10, 1920, and the bill was therefore, referred to the Federal Power Commission for report. The following letter from the executive secretary of that commission indicates that, with

respect to "power privileges," the enactment of the bill in its original form would repeal certain provisions of the Federal water power act:

FEDERAL POWER COMMISSION,
Washington, April 22, 1922.

HON. CARL HAYDEN,
House of Representatives, United States.

DEAR CARL HAYDEN: Reference is made to your letter of April 15, inclosing a copy of H.R. 10248, a proposed amendment of the act of April 16, 1906, and of the act of February 24, 1911, and requesting my opinion on the relation of this bill to the Federal water power act.

The act of April 16, 1906 (34 Stat. 116), authorizes the Secretary of the Interior "whenever a development of power is necessary for the irrigation of lands under any project undertaken under the said reclamation act * * * to lease for a period not exceeding 10 years * * * any surplus power or power privilege." This act was amended by the act of February 24, 1911 (36 Stat. 930), so as to extend the period of the lease to 50 years in case of the Rio Grande project. I understand that H.R. 10248 as introduced merely intended to add the Salt River project as one to which the 50-year period would also apply, but that it has since been suggested that the 50-year period be made generally applicable to all reclamation projects.

As I understand section 5 of the act of April 16, 1906, it authorizes: (1) The sale of surplus power from any plant built and operated by the United States in connection with any irrigation project; (2) the lease of the power plant itself; or (3) the lease of the "power privilege" in connection with any such project; that is the right to individuals or corporations to construct and operate power plants for the utilization of the available water power at reclamation dams or in connection with reclamation projects.

The Federal water power act when first introduced into Congress proposed to give authority to the Federal Power Commission to issue licenses "for the purpose of utilizing the surplus water or water power from navigation dams" only. This provision was amended in the House committee by substituting "Government" for "navigation," and the following definition of "Government dam" was adopted:

Senate Report No. 826 (1922)

"Government dam" means a dam or other work, constructed or owned by the United States for Government purposes, with or without contribution from others.

The act also provides for the issuance of licenses for the construction and operation of power projects upon any part of the public lands and reservations of the United States, and for the payment into the reclamation fund of 50 per cent of the charges arising from the use of public lands and reservations (except tribal Indian lands).

In view of the above I am of the opinion that in respect, at least, to the disposition of "power privileges" at reclamation dams or in connection with reclamation projects the Federal water power act superseded the act of April 16, 1906. The Federal water power act, however, gives no authority for the sale of surplus power from plants built and operated by the United States. If this view is correct, the passage of H.R. 10248 in its proposed form would reenact in full the provisions of section 5 of the act of 1906 and would, therefore, repeal all provisions of the Federal water power act with respect to power privileges at reclamation dams, and possibly with respect to such privileges as have any relation to irrigation projects. Whether H.R. 10248 should be limited to the sale of power, or should include lease of constructed plant and of power privileges, removing the latter from the scope of the Federal water power act, is of course a matter for Congress to determine.

I am inclosing, as you requested, the drafts which we discussed; the first, limiting the authority to the right to contract for sale of power, the second, covering the sale of power and lease of constructed works. These are submitted merely as suggestions of form to cover both alternatives, if you should wish to adopt either. The proviso contains merely verbal changes in the form as submitted in your letter. It would seem desirable whatever plan is followed be made generally applicable.

Very truly yours,

O.C. MERRILL,
EXECUTIVE Secretary

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(remainder omitted)

HOUSE REPORT NO. 1704 (1938)

75TH CONGRESS, 3d Session } HOUSE OF REPRESENTATIVES { REPORT NO. 1704

SALE OF SURPLUS POWER, DEVELOPED UNDER THE UNCOMPAHGRE VALLEY RECLAMATION PROJECT, COLORADO

JANUARY 18, 1938.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

MR. ROBINSON of Utah, from the Committee on Irrigation and Reclamation, submitted the following

REPORT

[To accompany H.R. 7764]

The Committee on Irrigation and Reclamation, to whom was referred the bill (H.R. 7764) to authorize the sale of surplus power developed under the Uncompahgre reclamation project, Colorado, having considered the same, report it to the House with the recommendation that it do pass with the following amendment:

Page 2, line 9, after the word "determine" strike out the period and substitute therefor a colon and add the following:

And provided further, That if the said association is not required to pay interest on the construction cost of the power plant and power system, the net earnings of the power plant and system, after the association shall have paid the full cost thereof, and its project construction charge indebtedness to the United States shall be payable into the reclamation fund, unless Congress shall hereafter otherwise direct.

House Report No. 1704 (1938)

Inasmuch as the passage of this legislation and development of power on the Uncompahgre Valley project would furnish employment, cheap power, and develop resources within this area, the committee is unanimous in its belief that this legislation is timely and feasible and therefore recommends its passage. The bill in its present form meets with the approval of the Director of the Budget and the Secretary of the Interior, as disclosed in the following letter which is attached hereto and made a part of this report.

DEPARTMENT OF THE INTERIOR,
Washington, August 12, 1937.

HON. COMPTON I. WHITE,
Chairman, Committee on Irrigation and Reclamation,
House of Representatives.

MY DEAR MR. WHITE: I have received your letter of July 8, asking for my report on H.R. 7764, to authorize the sale of surplus power that may be developed on the Uncompahgre Valley reclamation project in Colorado.

The development of power on the Uncompahgre Valley project is of doubtful financial and economic feasibility. As the investment is precarious, and certainly would be unwarranted if interest is to be collect upon the cost, the bill very properly would require the Uncompahgre Valley Water Users' Association to pay the construction and other costs of the power system.

Whether interest on the power development cost is to be collected is left to the determination of the Secretary under the bill. It is arguable, with a good deal of plausibility, that when the Bureau constructs a power plant not absolutely required in connection with the construction or operation of a project, and when the water users are to receive the earnings of the plant, they ought to pay the construction cost with interest, certainly in all cases where the Government is required to pay interest on the funds invested in the power system. A subsidy to irrigation development for ultimate private ownership may be warranted, but a subsidy to power development for ultimate private ownership might not be supportable.

House Report No. 1704 (1938)

In view of this, I think it would be well to change the period at the end of the bill to a colon and to add the following after the colon:

"*And provided further,* That if the said association is not required to pay interest on the construction cost of the power plant and power system, the net earnings of the power plant and system, after the association shall have paid the full cost thereof, and its project construction charge indebtedness to the United States shall be payable into the reclamation fund, unless Congress shall hereafter otherwise direct."

The draft of the bill was referred to the Director of the Bureau of the Budget, who states that the bill, as introduced, would not be in accord with the program of the President, but that the bill would not be in conflict therewith, if modified as suggested above. Therefore, its enactment, with the foregoing addition, is recommended.

Sincerely yours,

CHARLES WEST,
Acting Secretary of the Interior.

EXCERPT FROM WATERS AND WATER RIGHTS BY ROBERT EMMET CLARK, VOLUME 2

Section 112. INITIATION AND AUTHORIZATION OF PROJECTS

112.1 Historical development of initiation procedures

Under the Reclamation Act of 1902 the Secretary of the Interior had remarkably broad authority to initiate projects. Without any action by Congress he was empowered to make examinations and surveys and to let contracts for construction.[14] He was limited only by the requirement that he determine the project to be "practicable," [15] and that meant merely that there must be money in the reclamation fund and that the Secretary must secure the return of the estimated cost of construction within ten years.[16]

This freedom was short-lived—no doubt as a result of the carelessness with which some early projects were prosecuted— and by 1910 Congress provided that no irrigation project could be begun until it was approved by the direct order of the President.[17] Another step toward the present system was taken in the Fact Finders Act of 1924 which specifically re-

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[14]Act of June 17, 1902, ch. 1093, §2, 32 Stat. 388, 43 U.S.C. 411.

[15]Act of June 17, 1902, ch. 1093, §4, 32 Stat. 389, 43 U.S.C. 419.

[16]Ibid.

[17]Act of June 25, 1910, ch. 407, §4, 36 Stat. 836, 43 U.S.C. 413. Formally this restriction has been superseded by the Reclamation Project Act of August 4, 1939, ch. 418 § 9(a), 53 Stat. 1193, 43 U.S.C. 485h (a), but for all practical purposes prior submission of feasibility studies to the budget bureau achieves a similar limitation on the Secretary.

quired the Secretary, in his report to the President, to include information on technical subjects such as water supply, engineering features, cost of construction, land prices, and probable cost of development.[18]

Even the 1902 Act had required that projects be financially feasible, in that they be able to repay their costs. By 1924 Congress had come to recognize in addition the need for "agricultural and engineering feasibility" and it adopted also the essential concept of economic feasibility—today implemented in the benefit-cost analysis—by requiring the secretary to show, as to any proposed project, "the reasonableness of its estimated construction cost."[19]

112.2 Current procedure for project initiation

Project-initiation procedure took its present form in the Reclamation Project Act of 1939. The basic provision governing project initiation is section 9 (a) of that Act[20] which provides that "no expenditures for the construction of any new project... shall be made... by the Secretary until after he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on" engineering feasibility, the estimated cost of proposed construction and the part of the cost which can properly

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[18]Act of December 5, 1924, ch. 4, §4 B, 43 Stat. 702, 43 U.S.C. 412.

[19]Act of December 5, 1924, ch. 4, §1, 43 Stat. 685.

[20]Act of August 4, 1939, ch. 418, § 9(a), 53 Stat. 1193, 13 U.S.C. 485h (a).

be allocated to irrigation, power, municipal and miscellaneous purposes and probably be repaid to the United States. It then continues:

> If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations... together with any allocation to [non-reimbursable purposes] equal the total estimated cost... then the new project... shall be deemed authorized and may be undertaken by the Secretary.

In practical operation, this provision is implemented by certain preliminary steps to be taken before any project can get under way. The first is a reconnaissance investigation, which is a preliminary field report initiated by the Bureau of Reclamation. "The chief purpose of the reconnaissance report is to indicate whether further detailed investigations are justified."[21] If the reconnaissance report shows that a possible development plan may be feasible, and if there has been specific authorization by Congress,[22] the Bureau may proceed with its major investigation

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[21]Golze, *Reclamation in the United States*, p. 131 (1961).

[22]Federal Water Project Recreation Act of July 9, 1965, P.L. 89-72, §8, 79 Stat. 217, 16 U.S.C. 4601-19. The real reason for imposing a specific authorization requirement, it is reported, was to prevent the Bureau of Reclamation from undertaking a study of the feasibility of importing water from the Pacific northwest into the Lower Colorado River Basin. Clark, Condemnation of Water Rights for Preferred Uses—A Replacement of Prior Appropriation?, 3 Willamette L.J. 215, 229 (1966).

leading toward the preparation of a so-called feasibility report.

The basic document upon which authorization of a project rests is the regional director's report. This report contains a comprehensive analysis of the project area, water supply construction plans, agricultural economy and needs, repayment capability of farmers, economic justification based on a benefit-cost analysis, allocation of costs among functions in a multi-purpose project, analysis of reimbursement ability among the uses, a conclusion, and a recommendation as to authorization.[23] The principal features of the report are the findings of engineering and financial feasibility (ability of the project to repay its reimbursable costs), both of which the statute expressly requires, and of economic feasibility (benefit-cost analysis). A finding of economic feasibility is not expressly required by the reclamation laws; it is a requirement which has been derived from the Flood Control Act.[24] The essentials of the determination of

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[23]When the Secretary recommends a project to Congress, his report and the report of the regional director, which the Secretary has also forwarded, are customarily printed together as a House Document.

[24]Act of June 22, 1936, ch. 688, §1, 49 Stat. 1570, 33 U.S.C. 701a. See The President's Water Resources Council, *Policies, Standards and Procedures in the Formulation, Evaluation and Review of Plans for Use and Development of Water and Related Land Resources,* S. Doc. No. 97, 87th Congress, 2d Sess. (1962). See also 2 Task Force on Water Resources and Power, *Report Prepared for the Commission on Organization of the Executive Branch of the Government,* pp. 626-631 (1955); *Reclamation—Accomplishments and Contributions,* Legislative Reference Service, Library of Congress, 86th Congress, 1st Sess., Committee Print No. 1, p. 44 (1959).

economic and financial feasibility will be discussed in detail in subsection 112.3.

If the regional director's report is favorable, it is forwarded to the Secretary. The Secretary is required, under the Flood Control Act,[25] to give to affected states and to the Secretary of the Army information developed by his investigations and an opportunity to co-operate therein; moreover, he is required to transmit to them a copy of his proposed report for their written views and recommendations, which he must then submit to Congress along with his report. If the submissions of the affected states or the Secretary of the Army set forth objections to the proposal, it may not be authorized except by an Act of Congress, which is, in practice, required anyway.[26]

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[25]Act of December 22, 1944, ch. 665, §1, 58 Stat. 887, 33 U.S.C. 701-1 (c).

[26] Ibid. The rules requiring interagency co-operation are to some extent attibutable to a history of rivalry among the various departments—Interior, Agriculture, Federal Power Commission and Army Corps of Engineers—that share jurisdiction over the water resources. Interagency conflict has appeared in a variety situations. The Solicitor of the Interior Department was once called upon to decide whether the Secretary could investigate potential projects affecting flood control in light of a provision in the Flood Control Act stating that federal investigations for flood control shall be under the jurisdiction of and shall be prosecuted by the War Department. He held—illustrating the rivalry—that this provision was meant only to bar competition by Agriculture, not Interior. Sol. Op. M-36505, 65 I.D. 130 (1958).

A more serious conflict arose between the Secretary and the Federal Power Commission over the meaning of congressional "approval" of a plan of comprehensive development for the Roanoke River Basin. The Secretary sued as the official

In addition, the Secretary is required to consider water quality control as well as to consult with wildlife officials in each state in which there is to be construction "with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as by providing for the development and improvement thereof."[27] In this connection any state agency's reports must be made "an integral part" of any report by the Secretary, and the Secretary must "give full consideration to " any such report in his project plans.[28]

Subject to the foregoing limitations, upon a finding of feasibility, and upon submission to the President and Congress of his report and findings, a project is automatically "deemed authorized and may be under-

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marketing agent for federally developed hydro-electric power, urging that congressional approval of the comprehensive plan withdrew all sites from the Federal Power Commission's private licensing jurisdiction and reserved them for public construction. Though the report certainly assumed federal construction in its calculations and recommendations, the Supreme Court held that in the absence of a recommendation for public construction which is "clearly an integral part of the plan," approval means only congressional acceptance of the technical aspects of the plan, such as location of projects, size, and purposes they are to serve. United States ex rel. Chapman v. Federal Power Comm., 345 U.S. 153, 160, 97 L. Ed. 918, 73 Sup. Ct. 609 (1953).

[27]Act of August 12, 1958, P.L. 85-624, §2 (a), 72 Stat. 564, 16 U.S.C. 662 (a) (wildlife); Act of October 2, 1965, P.L. 89-234, §2 (a), 79 Stat. 903, 33 U.S.C. 466a (b) (1) (water quality).

[28]Act of August 12, 1958, P.L. 85-624, § 2 (b), 72 Stat. 564, 16 U.S.C. 662(b).

taken by the Secretary."[29] In fact, the automatic authorization procedure is not currently used;[30] congressional authorization of each project is obtained.

The statutory submission to the President is accomplished by sending the report to the Bureau of the Budget for "advice concerning the relationship of the project to [the President's] program before transmitting the report to the Congress."[31] At this point the Secretary sends his report to Congress, recommending that authorization be made by

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[29]Act of August 4, 1939, ch. 418, § 9(a), 53 Stat. 1193, 43 U.S.C. 485h (a). Even if the Secretary utilized the automatic authorization device, he could not, as a practical matter, undertake to go ahead with the project on his own, since a 1914 statute prohibits the Secretary from expending reclamation fund money except as authorized by annual congressional appropriations. Act of August 13, 1914, ch. 247, §16, 38 Stat. 690, 43 U.S.C. 414. It has not been thought that this restriction is affected by the "may be undertaken" language of the Reclamation Project Act of August 4, 1939, ch. 418, §9 (a), 53 Stat. 1193, 43 U.S.C. 485h (a). But see Reclamation Project Act of August 4, 1939, ch. 418, §9 (b), 53 Stat. 1194, 43 U.S.C. 485h (b).

A project found not feasible may still lawfully be undertaken by the Secretary after special provision for it has been made by Act of Congress, following a submission of the Secretary's report and findings to the President and the Congress. Reclamation Project Act of August 4, 1939, ch. 418, § 9(a), 53 Stat. 1193, 43 U.S.C. 485h (a).

[30]Golze, *Reclamation in the United States*, p. 125 (1961).

[31]This is the language used by the Secretary in his letter to the Bureau of the Budget. E.g., H.R. Doc. No. 208, 88th Congress, 2d Sess., p. V (1964).

statute. The authorization acts frequently include a substantial number of special rules and conditions which become the law of the project for that particular enterprise.[32]

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[32]A number of such authorization acts are printed in 43 U.S.C. beginning at § 614. See also Bureau of Reclamation, Dept. of Interior, *Project Feasibilities and Authorizations* (Govt. Print. Office, 1957).

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2160

In the Supreme Court of the United States

OCTOBER TERM, 1986

TOWN OF NORWOOD, PETITIONER

v.

UNCOMPAHGRE VALLEY WATER USERS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE FEDERAL ENERGY REGULATORY COMMISSION AND FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Act of June 22, 1938, ch. 577, 52 Stat. 941, gives the Secretary of the Interior exclusive authority to develop, or contract for the development and sale of, surplus power at the Uncompahgre Valley Reclamation Project, precluding the Federal Energy Regulatory Commission from exercising jurisdiction over the project under the Federal Power Act, 16 U.S.C. 791a *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2160

TOWN OF NORWOOD, PETITIONER

v.

UNCOMPAHGRE VALLEY WATER USERS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 785 F.2d 269. The order of the court of appeals (Pet. App. 38a-39a) denying the petition for rehearing is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1986. A petition for rehearing was denied on April 7, 1986. The petition for a writ of certiorari was filed on June 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Act of June 22, 1938, ch. 577, 52 Stat. 941, is reproduced at Pet. 4-5. The relevant provisions of the Federal Power Act, 16 U.S.C. 791a *et seq.*, are reproduced at Pet. 3-4.

INTEREST OF THE UNITED STATES

The Federal Energy Regulatory Commission (FERC) is a party respondent. The United States (on behalf of the Department of the Interior) participated below as amicus curiae. FERC and the United States (on behalf of the Department) disagree on the merits but agree that this case does not warrant review by this Court.

STATEMENT

1. The origins of this controversy lie in the filing, late in 1980 and early in 1981, of several competing applications with FERC for preliminary permits to develop hydroelectric projects at six sites within the Uncompahgre Valley Reclamation Project.[1] Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), authorizes FERC to issue licenses for hydroelectric projects using "the surplus water or water power from any Government dam." Before a license is issued, FERC may issue permits allowing potential developers to study sites before committing the time and substantial funds necessary to file a license application (16 U.S.C. 797(f)). The City of Montrose was among several applicants for preliminary permits and, because it was the only municipal applicant, FERC on October 26, 1981, issued preliminary permits to the City and denied the applications filed by others.[2] Approximately six months later, the City surrendered its permits (Pet. App. 6a). On the same day, the Uncompahgre Valley Water Users Association (UVWUA),

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[1]The Uncompahgre Reclamation Project was developed pursuant to the Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. 371 *et seq.* The Secretary of the Interior authorized the Project in 1903 for the purpose of diverting water from the Gunnison River in the Uncompahgre Valley, which is located near the City of Montrose, Colorado. Pet. App. 4a.

[2]The Federal Power Act, § 7(a), 16 U.S.C. 800(a), provides that FERC must "give preference to applications [submitted] by States and municipalities, provided the plans * * * are * * * equally well adapted * * * to conserve and utilize in the public interest the water resources of the region."

a Colorado non-profit association which took over the maintenance and operation of the Uncompahgre Project in 1932 and served as managing agent for the City in the permit proceeding, and Montrose Partners (MP), a limited partnership formed under the laws of Massachusetts, filed license applications for the sites for which the City had just surrendered its permits (*id.* at 4a, 6a). Because the City's surrender of its permits and the subsequent filing by UVWUA and MP for licenses suggested the possibility of concerted action, FERC ordered the parties to respond to a rebuttable presumption that they had abused the municipal preference (*id.* at 6a-7a). FERC ultimately concluded that the City, UVWUA, and MP had abused the municipal preference and dismissed their license applications, suspended them for one year from applying to develop the sites, and reopened the bidding for the six sites (*id.* at 7a).

Upon reopening the bidding, FERC received approximately 19 applications for licenses or preliminary permits for power projects. Petitioner, the Town of Norwood, a small ranching community and municipality in Colorado, was the only municipal applicant and filed applications for five power project sites. In June 1984, while these applications were pending, UVWUA and MP petitioned the court of appeals for review of FERC's orders.

In May 1985, the Department of the Interior responded to FERC's request (pursuant to the 16 U.S.C. 797(c)) for comments on the pending applications. Interior asserted that under the Act of June 22, 1938, ch. 577, 52 Stat. 941, the Secretary of the Interior, acting through the Bureau of Reclamation, possesses exclusive authority to develop the power potential of the Uncompahgre Valley Project.[3] The

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[3]Interior's conclusion that it has exclusive authority under the 1938 statute to develop the power potential of the Uncompahgre Project was a new position. In several letters written between 1981 and 1985, Interior officials commented on various licensing applications pending

Secretary recommended that FERC reject, for lack of jurisdiction, all pending applications, as well as any future applications for power development within the Project. Pet. App. 7a.

2. The question of FERC's jurisdiction was raised in the court of appeals in oral argument on the UVWUA and MP petitions for review, and the court of appeals ordered supplemental briefs addressing the jurisdictional issue. In an order issued on August 9, 1985 (Pet. App. 18a-37a), and in its supplemental brief, FERC rejected Interior's claim of exclusive jurisdiction. FERC contended that it retained its authority over the Project under the Federal Power Act, as long as the Secretary of the Interior failed to take affirmative action to authorize power development on the Project (*id.* at 31a-32a). Because the Secretary had not taken such affirmative action here, FERC argued that the Act of June 2, 1938, did not divest it of jurisdiction over the Project (*id.* at 32a-33a). The court of appeals granted petitioner leave to intervene in the action for the limited purpose of addressing the jurisdictional issue. The United States, on behalf of the Department of the Interior, participated as amicus curiae and asserted the view that FERC lacked jurisdiction.

FERC based its contention that it retains jurisdiction on the Act of Apr. 16, 1906, ch. 1631, 34 Stat. 117, which governs reclamation projects in general (Pet. App. 25a-33a). FERC asserted that Section 5 of the 1906 statute and the 1938 statute are essentially the same (Pet. App. 32a). From this essential "sameness," FERC concluded that the 1938 statute should be construed in the same manner as the 1906 statute (*ibid.*). FERC noted that under the 1906 statute

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before FERC for power projects to be located within the Uncompahgre Project. In those letters, Interior either assumed FERC possessed jurisdiction, by stating that Interior did not object to FERC's licensing of the projects, or did not raise the jurisdictional issue at all.

an assertion of jurisdiction by the Secretary "must be preceded by a formal administra tive authorization and feasibility finding" (*id.* at 28a). FERC argued that the 1938 statute required the identical procedure (*id.* at 32a-33a). FERC further asserted that under this Court's decision in *Chapman* v. *FPC*, 345 U.S. 153, 170 (1953), in the absence of express congressional removal of FERC jurisdiction, FERC loses jurisdiction only if Congress takes over the project directly and authorizes its construction by the United States "or if Congress otherwise 'clearly manifest[s]' that the Commission's jurisdiction * * * is withdrawn" (Pet. App. 23a-24a). According to FERC, Congress took neither action in the 1938 statute, and, consequently, did not withdraw FERC's jurisdiction.

The court of appeals, adopting the contrary view urged by the United States on behalf of the Department of the Interior, vacated FERC's orders and dismissed UVWUA and MP's petitions for review on the ground that the Secretary has exclusive jurisdiction over the development and licensing of hydropower facilities at the Uncompahgre Project (Pet. App. 1a-17a). The court found (*id.* at 15a) nothing in the 1938 statute or its legislative history to support the view that the Secretary must take affirmative steps to oust FERC's claim of concurrent jurisdiction. The 1938 statute, the court concluded, takes precedence over the Federal Power Act's general grant of jurisdiction to FERC because the 1938 statute is a "specially-purposed enactment which contains provisions applicable only to a specific situation," in which the Secretary's role is "specific and circumscribed" (*id.* at 16a-17a). The court stated (*id.* at 17a) that the position urged by FERC would render the 1938 statute meaningless.

ARGUMENT

FERC and the United States (on behalf of the Department of the Interior) disagree as to the correctness of the decision of the court of appeals. Both agree, however, that

further review is unwarranted: regardless of the correctness of the decision below, it does not present a legal issue of sufficient importance to warrant this Court's review.

1. Petitioner claims that the decision of the court of appeals is incorrect and conflicts with this Court's decision in *Chapman* v. *FPC*, 345 U.S. 153 (1953), and the Fourth Circuit's decision in that case (see 191 F.2d 796 (1951)). In petitioner's view, the 1938 Act does not evince the clear congressional intent necessary to exclude FERC, which has general jurisdiction under the Federal Power Act over hydropower development, from exercising such jurisdiction over projects within the Uncompahgre Reclamation Project.

FERC agrees that the decision below is incorrect. FERC believes that the 1938 Act should be read against the backdrop of the Reclamation Act of 1906, under which the authority of the Secretary of the Interior over such projects depended on "a formal administrative authorization and feasibility finding," and that the correct way to harmonize the Federal Power Act and the 1938 Act is that the Secretary has jurisdiction if he asserts it but otherwise the Commission may act.[4] FERC also believes that this Court's decision in *Chapman* v. *FPC, supra*, requires more concrete evidence of congressional intent to divest FERC of jurisdiction than it believes is present here. (See page 5, *supra*.)

The United States (on behalf of the Department of the Interior) agrees with the court of appeals (Pet. App. 16a-17a) that where, as in this case, a specific statute (the 1938

[4]FERC rejects, however, much of petitioner's analysis. For instance, while petitioner argues that the legislative history of the Act of Apr. 16, 1906, ch. 1631, 34 Stat. 117, is of little relevance to this case (Pet. 11 n.6), FERC shares (Pet. App. 32a) the court of appeals' view (*id.* at 12a) that the 1938 Act should be construed in tandem with the 1906 Act. FERC also does not rely on the 1922 law heavily relied upon by petitioner (Pet. 16-19) and instead agrees with the United States that the 1938 Act, like the 1906 Act, extends to the leasing of power privileges (*id.* at 32a n.26). FERC's position is set out in full in its formal order (see Pet. App. 18a-37a).

Act) authorizes certain activity (the development of hydropower within the Uncompahgre Reclamation Project), a general statute (the Federal Power Act) should not (in the absence of other evidence of congressional intent) be read as superseding the specific enactment. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). The United States (on behalf of the Department of the Interior) believes that providing FERC with concurrent jurisdiction over hydropower development within the reclamation area would frustrate the purposes of the 1938 Act. (FERC disagrees with this position and believes concurrent jurisdiction would serve appropriate regulatory purposes (see Pet. App. 31a-32a)).

The United States (on behalf of the Department of the Interior) also believes that this Court's decision in *Chapman* does not compel a different result than that reached by the court of appeals. In *Chapman*, this Court held that an act of Congress approving an Army Corps of Engineers river-basin development, which contemplated the construction of eleven hydropower projects, but authorized only two of the projects, did not divest FERC of jurisdiction over the other nine unauthorized sites. See 345 U.S. at 163-166. The United States believes that *Chapman*, which involved only congressional approval of a basin-wide development plan and authorization of two specific sites, is distinguishable from the present case because the 1938 Act specifically authorizes power development under the direction of the Secretary at one named federal reclamation project; no further congressional authorization is necessary.[5] (FERC disagrees with this reading of *Chapman* (see page 5, *supra*; Pet. App. 23a-35a)).

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[5]Petitioner also claims (Pet. 10-15) that the 1938 Act is insufficient, by itself, to oust FERC of concurrent jurisdiction because the Act reflects congressional intent to authorize the Secretary only to contract for the sale of surplus power and not final and definite congressional intent to authorize federal construction of hydropower projects. Although the

Finally, the United States believes that petitioner's reliance (Pet. 22) on several letters from subordinate Interior officials to FERC, which assume FERC jurisdiction, is misplaced. The United States believes that it is neither surprising nor determinative that subordinate Interior officials, commenting on the merits of applications to FERC, did not have occasion to consider the significance of the 1938 law to FERC's jurisdiction over the Uncompahgre Project. Certainly none of that prior correspondence reflected the Secretary's considered analysis of the issue.[6] And in any event, as the court of appeals said (Pet. App. 15a n.5), that earlier correspondence should not be dispositive, because " 'even consistent error is still error." ' *Ibid.*, quoting *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678 n.5 (1954).[7]

United States agrees that the legislative history of the 1938 Act suggests that certain legislators anticipated that the project would be financed by non-federal monies (see 83 Cong. Rec. 2248 (1938) (Reps. Taylor and Rich)), the United States disagrees with the claim that Congress did not intend to authorize federal construction of hydropower development. The Act expressly provides that if water users do not pay interest on federal expenditures for hydropower development, net earnings are to be paid into the reclamation fund only after the water users have discharged their repayment obligations for "project construction charge indebtedness to the United States" (52 Stat. 941). The clear import of this provision is that Congress presumed federal construction of hydropower facilities.

[6]The Task Force Report quoted at length by petitioner (Pet. 21-22) does not represent a formal statement of the Secretary's legal views and does not support petitioner's position. The Report states only that Interior does not generally "assume" that it has exclusive jurisdiction over hydropower development (*id.* at 22), not that Interior might not possess such jurisdiction with respect to particular projects, such as the Uncompahgre.

[7]The Project Manager for the Bureau of Reclamation's Upper Colorado Region apparently advised UVWUA that Interior had no interest in developing power projects of less than a specified generating capacity, and even suggested that UVWUA file an application with FERC (see Pet. App. 5a). This advice was admittedly inconsistent with Interior's present view, but it is plainly not binding on the Secretary or determinative of the law. See *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 5 n.7.

2. Although FERC shares petitioner's view that the decision of the court of appeals is incorrect, FERC and the United States agree that the case does not merit further review. The case involves the relationship between the Federal Power Act and a specific federal statute that applies to only one federal reclamation project. The case therefore does not present an important issue of federal law. As petitioner concedes, the court of appeals' decision casts some doubt on, at most, one pre-existing permit and one pre-existing license issued by FERC (Pet. 9 nn.4 & 5).[8] The court of appeals' decision does not, moreover, necessarily invalidate these prior FERC actions, which were taken under at least a colorable claim of agency jurisdiction.

Finally, review is inappropriate because developments may soon effectively moot the controversy. Under petitioner's view, FERC possesses concurrent jurisdiction; according to FERC (Pet. App. 31a-32a), concurrent jurisdiction means that its jurisdiction continues until such time as the Secretary either begins actively to direct the Bureau of Reclamation to commence construction activities or the Secretary executes an appropriate lease agreement with private entities concerning power privileges. The Secretary is currently studying a proposal for power development (see 50 Fed. Reg. 50238 (1985)), and such a lease agreement may be entered into in the near future. Should that occur, FERC would lack jurisdiction at those sites under FERC's own view of the law and, presumably, under petitioner's as well.

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[8]The reference to 28 projects in the Department of the Interior's brief as amicus curiae in the court of appeals, cited by petitioner (Pet. 9), includes projects constructed under all reclamation laws, the vast majority of which contain statutory language different from that in the 1938 Act; only three statutes covering a total of three reclamation projects contain similar language.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 85-2160

In The
Supreme Court of the United States
October Term, 1986

TOWN NORWOOD,

Petitioner,

vs.

UNCOMPAHGRE VALLEY WATER USERS ASSOCIATION, MONTROSE PARTNERS, FEDERAL ENERGY REGULATORY COMMISSION, AND DEPARTMENT OF THE INTERIOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER, TOWN OF NORWOOD, TO BRIEF IN OPPOSITION FOR THE FEDERAL ENERGY REGULATORY COMMISSION AND FOR THE UNITED STATES AS AMICUS CURIAE

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No. 85-2160

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STATEMENT

The petition for writ of certiorari was filed on June 27, 1986. A brief in opposition for the Federal Energy Regulatory Commission and for the United States as

amicus curiae was filed in typewritten form on August 29, 1986. A printed copy of said brief was filed on September 5, 1986.

The Uncompahgre Valley Water Users Association and the Montrose Partners have not filed any brief in opposition to the petition of Norwood.

ARGUMENT

I. THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

Petitioner disagrees with the position of the United States that this case does not present an important issue of federal law and that the decision of the Tenth Circuit applies only to one reclamation site.

The Tenth Circuit's ruling relied upon the principle that specific legislation should control over general legislation with regard to hydropower development authority on a reclamation project. However, the Tenth Circuit failed to define the extent of the specificity required or to provide any policy guidelines.[1]

If that simple ruling is allowed to remain, it will be natural for Interior to next argue before the Tenth Circuit that the Act of April 16, 1906, section 5, 34 Stat.

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1. The Tenth Circuit refused to grant FERC additional time in order to petition for re-hearing. Said petition for re-hearing by FERC may have provided valuable administrative input as to the ramifications of the ruling of the Tenth Circuit.

117, 43 U.S.C. 522, is specific with respect to the "subject matter" of development of hydropower on reclamation sites and as such should control over the Federal Power Act of June 10, 1920, 41 Stat. 1063, 16 U.S.C. 791a *et seq.*

This result will completely frustrate the scheme established by Congress under the Federal Power Act for the comprehensive administration of hydropower development, will undermine the holding of this Court in *Chapman v. FPC,* 345 U.S. 153 (1953), and will create chaos for the development of hydropower, particularly its financing. The only difference between the 1906 act and the act of June 22, 1938, 52 Stat. 941, for purposes of applying the holding of the Tenth Circuit, is that the latter refers to a specific project (but note, not a specific site within the project).

However, almost every reclamation project in the western United States has had some specific legislation enacted for it—often times concerning some aspect of hydropower development. Under the simplistic holding of the Tenth Circuit, it appears that if there is specific legislation concerning the "subject matter" of hydropower development, the authority to administer such development is vested with Interior. For some examples of the mischief this ruling will create note the two projects mentioned in the petition (Pet. 9 at footnotes 4 & 5). Also note the Ruedi dam for which FERC has already issued a license on September 8, 1983, to the City of Aspen and County of Pitkin (FERC Project No. 3603) and the act of August 17, 1962, section 1, 76 Stat. 389, 43 U.S.C. 616 wherein specific mention is made of hydropower construction.[2] Failure of this

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2. If further time were available for research, this petitioner is confident additional examples would be uncovered revealing the chaos the ruling of the Tenth Circuit creates for hydropower development.

Court to review and reverse the ruling of the Tenth Circuit will result in continued uncertainty as to which agency has the authority over the development of hydropower at these sites.

Additionally, FERC as repeatedly stated in the brief in opposition, disagrees with the ruling of the Tenth Circuit. Without a ruling from this Court settling the law of the authority of FERC versus Interior at reclamation sites, the likelihood of repeated litigation before other Circuit Courts for other sites on the issue of specificity is great.

During the pendency of all these suits, private capital will be unwilling to pursue hydropower development via FERC, thus frustrating the intent of Congress expressed in the Federal Power Act to maintain a continued inducement to private capital for financing hydropower development.

II. ANY ACTION BY INTERIOR THAT WOULD MOOT THE CONTROVERSY IS YEARS AWAY

Petitioner disagrees with the position of the United States that developments by Interior may soon moot the present controversy.

Construction or contracting with regard to hydropower development on the Uncompahgre Project requires compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* At this time for the Uncompahgre Project a draft Environmental Statement has yet to be prepared by Interior. After the draft is prepared and issued, there must be a comment period (at least 60 days) and review before issuance of a final statement. After the NEPA process, and if a decision is made to pro-

ceed with hydropower development, it appears that Interior then must follow its own established procedures. (Pet. 23). These procedures can require a substantial period of time. Finally funding must be obtained, which most likely will not be forthcoming until there is resolution of all controversies, including the action before this Court.

Note also that for the Uncompahgre Project, Interior at this time appears to be proceeding with a configuration for hydropower development which requires the procurement of rights-of-way over 157.0 acres of private land, 15.0 acres of municipal land, and 2.0 acres of state land all in addition to 16.3 acres of land under the actual control of the Bureau of Reclamation.[3] Said procurement of non-federal rights in the near future by Interior for hydropower development without having the specific statutory right for eminent domain is problematical.

III. LICENSING BEFORE FERC MAY BE THE FASTEST METHOD FOR HYDROPOWER DEVELOPMENT TO OCCUR AT THE UNCOMPAHGRE PROJECT

With respect to hydropower development at the Uncompahgre Project before FERC, FERC has been prohibited from proceeding on the matter by a mandate of the Tenth Circuit issued April 15, 1986. FERC complied with the mandate in its "Order Dismissing Applications"

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3. See License Application before FERC filed by the Uncompahgre Valley Water Users Association and Montrose Partners in December 1984 for the AB Lateral Hydro Project (FERC Project No. 8839-000) at page A-11.

issued May 30, 1986. However, in said order, FERC held that it would reinstate the license and permit applications to their status as of before the order of the Tenth Circuit, if the United States Supreme Court should reverse the jurisdictional holding of the Tenth Circuit.

License applications for the Uncompahgre Project containing full adequate environmental impact statements have already been submitted to FERC and the applicable comment period for the statements has expired. Furthermore, under the Federal Power Act of June 10, 1920, eminent domain is provided in section 21, 41 Stat. 1074, 16 U.S.C. 814. Accordingly, it appears that except for the ruling of the Tenth Circuit, the fastest track for development of hydropower on the Uncompahgre Project is via FERC and private funding. In contrast, note Interior has had authorization under the 1983 act for nearly fifty (50) years without being able to develop the hydropower potential at the Uncompahgre Project.

IV. ALLOWING THE TENTH CIRCUIT RULING TO STAND WILL WORK GREAT ECONOMIC HARDSHIP UPON THE REGION

The determination of who will administer the hydropower development upon the Uncompahgre Project (FERC or Interior) will affect nearly 500 residents of the Town of Norwood in terms of their tax liabilities to the town and the town's ability to provide municipal services for the region. The projected annual profits from hydropower development on the Uncompahgre Project range from $800,000.00 to $6,000,000.00 (depending on the configuration analyzed) at present interest and power purchase rates. Such income, particularly if repeatedly re-spent

within the region, will provide a substantial financial boost to a presently economically depressed area.

However, Mitex Inc. of Boston, the former developer for the Uncompahgre Valley Water Users Association, has sold its full interest in the Uncompahgre Project to the Sithe/Energies Group. Sithe is an offshore affiliate to a French organization known as Compagnie Generale Des Eaux located in Paris. The result is that if Interior prevails in this controversy with its contract with the Uncompahgre Valley Water Users Association over 80% of the profits derived from the hydropower produced on the Uncompahgre Project will be severed from the region and the United States in favor of French investors. It is anomalous that Interior, which is empowered under the federal reclamation laws to foster and develop national water resources, is now party to a scheme to siphon off an unreasonable and disproportionate share of a project's profits to a foreign interest.

This exportation of profits to a foreign entity runs contra the intent of Congress to promote development of national power resources by citizens and entities of the United States as expressed in section 4(e) of the Federal Power Act of June 10, 1920, 41 Stat. 1065, 16 U.S.C. 797.

V. THE AUTHORITY OF INTERIOR TO EXCLUSIVELY ADMINISTER THE UNCOMPAHGRE PROJECT IS UNDERMINED BY THE DEPARTMENT OF ENERGY ORGANIZATION ACT WHICH TRANSFERRED THE POWER MARKETING FUNCTIONS OF THE BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR, TO THE DEPARTMENT OF ENERGY

The ruling of the Tenth Circuit hinged upon the grant to Interior in the 1938 act of authority to contract and sell surplus power. Under the Department of Energy Organi-

zation Act of 1978, all power marketing functions of Bureau of Reclamation, Department of the Interior, are transferred to the Department of Energy (DOE). See 42 U.S.C. 7152(1)(E) and 7152(3).

This transfer implies that the specific grant of contracting authority to Interior over surplus power contained in the 1938 act has been terminated. Thus under the reasoning of the Tenth Circuit, there would be no basis to find that Interior has any authority over the development of hydropower on the Uncompahgre Project.[4]

VI. THE ARGUMENT OF THE UNITED STATES THAT THE CHAPMAN CASE IS DISTINGUISHABLE IS FLAWED

The brief of the United States incorrectly argues that the holding in *Chapman v. FPC*, 345 U.S. 153 (1953) is distinguishable from this case simply because there is a specific statute for the Uncompahgre Project. This position is flawed and the *Chapman* case applies for the following reasons, among others: (1) *Chapman* examined the extent of specificity required to divest FERC's authority and focused upon clear and final congressional action which included a site plan and authorization of federal funding. A site plan and federal funding is not included in the 1938 act; and (2) *Chapman* required authorization of actual construction to divest FERC of authority whereas the 1938

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4. In conversations with DOE personnel, this author has been informed that DOE does not now or in the future intend to develop any hydropower projects.

act only concerns authorization regarding contracting of surplus power—a much more limited congressional grant.[5]

Chapman held at page 160 that the decisive matter in analyzing a specific statute is to note how Congress may fairly be said to have received and read the statute in light of its current legislative practices in relation to public works. As set forth in the petition, particularly in footnotes 9, 10 and 11 (Pet. 14-15), the 1938 act does not call for public construction nor provide for clear and final congressional action in light of the legislative practices of 1938.

VII. THE ARGUMENT OF THE UNITED STATES REGARDING COLOR OF AUTHORITY BEGS THE QUESTION OF CONCURRENT AUTHORITY OF FERC AND INTERIOR

The validity of the licenses and preliminary permits previously issued by FERC for reclamation projects with specific statutes containing "subject matter" on hydropower (Uncompahgre, Grand Valley, and Ruedi) will remain unresolved if the ruling of the Tenth Circuit is not reversed by this Court. The only remedy advanced by the United States to correct the dilemma is to suggest that FERC's prior actions may be valid under color of authority. However, no citation is presented for that proposition.

Allowing for the moment that the position has validity, it begs the question of when does the color of author-

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5. The 1938 act contemplates construction by the United States, if any only if, there is a contract for the sale of surplus power. This requires a financing package from a private entity. Compare footnote 5 of the brief of the United States (Brief 7-8) with the text and footnotes of the petition at pages 13-15.

ity vest? A logical position would be that FERC's authority vests once the comment and competition period has terminated for any given site. See FERC Regulations 4.33 and 4.36 under the Federal Power Act in 18 C.F.R. In that case, the possibility of Interior asserting authority over the Uncompahgre sites would have terminated on January 7, 1985, when the comment and competition period before FERC ended. However, Interior first raised the issue of its authority in its letter dated May 6, 1985, some 120 days after the close of that period.

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CONCLUSION

The brief of the United States is notable for its omissions. It basically fails to address the arguments and authorities presented in the petition. Instead, it primarily relies upon the concepts of 1) mootness and 2) narrowness of issues presented.

However, as noted above, the issue before this Court will not be rendered moot by any foreseeable actions of Interior and the federal issue presented herein does transcend beyond the limits of the Uncompahgre Project, thus requires settlement by this Court.

Accordingly, Norwood respectfully request that this petition for writ of certiorari be granted.

Respectfully submitted,

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